Supreme Court, U.S.
FILED

No. 001683 MAY - 8 2001

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IN THE

Supreme Court of the United States

CHURCH OF SCIENTOLOGY INTERNATIONAL,

Petitioner,

—v.—

TIME WARNER, INC., TIME INC. MAGAZINE COMPANY, and RICHARD BEHAR,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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130 pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether the court of appeals' decision creating a "subsidiary meaning doctrine," pursuant to which a knowingly false defamatory statement is protected by the First Amendment if a court concludes that it is "subsidiary in meaning" to a false defamatory "overall view" expressed without actual malice, conflicts with the Court's holding in *Masson* v. *New Yorker Magazine*, 501 U.S. 496 (1991), that the incremental harm doctrine is not mandated by the First Amendment?

2. Whether the court of appeals' unprecedented holding that a libel defendant's ill-will or bias is to be treated not as circumstantial evidence of actual malice, but as strong evidence of a *lack* of actual malice sufficient to compel granting summary judgment to the defendant unless the plaintiff can demonstrate a countervailing "*extreme* departure from standard investigative techniques," conflicts with the Court's decisions in *Anderson* v. *Liberty Lobby*, 477 U.S. 242, 255 (1986), and *Harte-Hanks Communications* v. *Connaughton*, 491 U.S. 657 (1989), as well as the decisions of other federal circuits and state supreme courts?

3. Whether a public-figure libel plaintiff must establish actual malice even when he seeks only to vindicate his reputation by an award of nominal damages, despite the fact that the rule established in *New York Times* v. *Sullivan*, 376 U.S. 254 (1964) was intended to protect defendants against

ruinous damage awards and the chilling effects of the danger of such awards, and despite the fact that the common law permits individuals to defend their reputations by seeking nominal damages premised on a finding of falsity?

PARTIES TO THE PROCEEDINGS BELOW

All parties appear in the caption of the case on the cover page.

CORPORATE DISCLOSURE STATEMENT
(Rule 29.6)

Petitioner is a not-for-profit non-stock religious corporation. It has no parent or subsidiary corporations.

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PETITION FOR WRIT OF CERTIORARI

The Church of Scientology International petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

Opinions Below

The January 12, 2001 opinion of the United States Court of Appeals for the Second Circuit affirming the judgments of the United States District Court for the Southern District of New York dismissing the petitioner's complaint is reported at 238 F.3d 168 (App. A, *infra*, 1a–16a). The November 23, 1992 opinion of the district court dismissing portions of petitioner's complaint on the ground that such portions were not "of and concerning" petitioner is reported at 806 F. Supp. 1157 (App. B, *infra*, 17a-35a). The November 14, 1995 opinion of the district court granting partial summary judgment to defendants on the grounds of lack of actual malice with respect to three published statements, and denying summary judgment with respect to one additional statement, is reported at 903 F. Supp. 637 (App. C, *infra*, 36a-50a). The July 17, 1996 opinion of the district court granting summary judgment to defendants on the remaining statement on the basis of the so-called "subsidiary meaning" doctrine, is reported at 932 F. Supp. 589 (App. D, *infra*, 51a-66a). The August 27, 1997 opinion of the district court denying petitioner's motion to modify the judgment is unreported and available on Westlaw at 1997 WL 538912 (App. E, *infra*, 67a-78a). The September 8, 1998 opinion of the district court denying petitioner's motion to amend the complaint after judgment is unreported and available on

Westlaw at 1998 WL 575194 (App. F, *infra*, 79a-89a).

Jurisdiction

The judgment and opinion (App. A, *infra*, 1a-16a) of the court of appeals from which review is sought were entered on January 12, 2001. On March 13, 2001, Justice Ginsburg extended the time within which to file a petition for writ of certiorari to and including May 12, 2001. The jurisdiction of the Court to review the decision of the court of appeals is invoked under 28 U.S.C. § 1254(1).

Statement of the Case

Proceedings Below

The article that precipitated this libel action was published in *Time Magazine* on May 6, 1991. Petitioner Church of Scientology International ("CSI") filed its complaint on April 27, 1992, alleging six sets of false and defamatory statements.[1] Jurisdiction was founded upon 28 U.S.C. § 1332(a). CSI alleged that the author, respondent Richard Behar, was so intensely biased against CSI that he had either knowingly lied or had rendered himself purposefully ignorant of the truth of the charges, intentionally ignoring or suppressing any evidence that called them into question. *See Harte-Hanks Communications, Inc.* v. *Connaughton*, 491 U.S. 657, 682 (1989).

The defendants ("*Time*") brought three successive motions, which cumulatively resulted in dismissal of all of CSI's claims.

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[1] The six statements are set forth in the court of appeals' opinion at 2a-5a, *infra*. The four statements still at issue are summarized, *infra*, at 5-6.

On November 23, 1992, the district court dismissed claims based on two of the statements and portions of two others on the ground that they were not "of and concerning" CSI (App. B, *infra*). On November 14, 1995, the district court granted summary judgment with respect to three of the remaining statements on the basis of the "actual malice" doctrine of *New York Times* v. *Sullivan*, 376 U.S. 254 (1964), finding that both Behar's bias and prior negative public statements about CSI, even if false, served to protect *Time* from a finding of actual malice (App. C, *infra*). The court denied summary judgment on the actual malice issue with respect to a statement implying that CSI had raised funds by engaging in stock market scams on the Vancouver Stock Exchange. *Time* then urged the district court to dismiss the sole remaining Vancouver claim under the incremental harm doctrine. On July 17, 1996, the district court dismissed the claim under what it denominated the "subsidiary meaning doctrine" (which had not been briefed or argued) (App. D, *infra*). Because defendant Behar had filed counterclaims, the judgment of dismissal was not a final appealable order.

CSI moved to modify the judgment pursuant to Fed. R. Civ. P. 54(b). CSI argued that even if it were precluded by *Sullivan* from seeking substantial damages, it still could seek nominal damages and a determination of the falsity of defendants' statements to vindicate its reputation, a claim which it argued was fairly included within its complaint. On August 27, 1997, the district court denied CSI's motion as untimely, but left open the possibility that CSI could amend its complaint to raise the issue (App. E, *infra*, 77a, n.8). CSI then moved for

leave to file an amended complaint. One year later, the district court denied CSI's motion, finding prejudicial delay and that the proposed amendment was futile on two grounds: (1) the amended complaint would not meet the amount in controversy requirement; and (2) a claim for nominal damages, like a claim for substantial damages, is subject to an actual malice defense under *Sullivan* (App. G, *infra*).

Behar then stipulated to dismiss his counterclaims, subject to a right to reinstate them if CSI's claims were revived on appeal. CSI appealed with respect to four of the statements upon which it originally sued. On January 12, 2001, the court of appeals affirmed (App. A, *infra*). The court did not reach the "of and concerning" issues, assuming for purposes of its decision that the entirety of the four sets of statements on appeal were "of and concerning" CSI. It held that CSI's claims with respect to three of the statements were precluded by the actual malice doctrine, and that the claim with respect to the remaining statement concerning the Vancouver Stock Exchange was properly dismissed under the so-called "subsidiary meaning doctrine." Without discussion, the court of appeals also held, on the merits, that CSI could not assert a claim for nominal damages or a declaration that the statements were false without also meeting the actual malice requirements necessary for an action for substantial damages.

Facts

This case arose out of defendants' publication in the May 6, 1991 issue of *Time* magazine of an eight page cover story entitled "The Thriving Cult of Greed and Power." The headline

on the cover of the issue reads: "Scientology: Cult of Greed. How the Growing Dianetics Empire Squeezes Millions From Believers Worldwide." The cover portrays CSI as a multi-tentacled, octopus-like exploding volcano. The article is a bitterly critical attack on the management and leadership of the Church of Scientology, asserting that Scientology "[i]n reality ... is a hugely profitable global racket that survives by intimidating members and critics in a Mafia-like manner."

The article makes general charges that CSI's leadership operates in a "mafia-like," "terrorist" way to fleece credulous people of their money. Then it offers a series of specific examples of alleged misbehavior to illustrate and reinforce the general charges. Several of the specific allegations are particularly false and defamatory, including: (1) allegations that CSI's leadership directed one Steven Fishman, purportedly an ex-Scientologist, to murder his therapist and to commit suicide in order to cover up CSI's alleged involvement in a fraudulent plan to participate in class action recoveries by using forged stock certificates; and (2) allegations that CSI financially squeezed an unfortunate young man, Noah Lottick, until he was destitute, and then abandoned him to suicide.

Finally, the article includes a separate sidebar, signed by Behar and entitled, "Mining Money in Vancouver." The sidebar implies that CSI knowingly directed and profited from stock scams – amounting to theft – on the Vancouver Stock Exchange, including an unethical takeover purportedly masterminded by Michael Baybak, identified as a Scientologist whose firm was staffed with Scientologists. The Vancouver statements are different in an essential manner from the article

in general, which focuses, as its title indicates, on "How the Growing Dianetics Empire Squeezes Millions From *Believers* Worldwide" (emphasis added). The sidebar, in contrast, alleges that CSI engaged in a vast scam to "Min[e] Money in Vancouver" by defrauding the general public.

The ferocity of the article's attack on Scientology reflected its author's long-standing animus against the Church, an animus that was well known to the editors of *Time*. Five years earlier, Behar had authored a broadside in *Forbes* magazine entitled "The Prophet and Profits of Scientology," which asserted that CSI was simply a mechanism for transferring vast sums of money to L. Ron Hubbard, the founder of Scientology. Throughout the *Forbes* article, Behar refused to describe Scientology as a religion, instead placing each occurrence of the term "religion" within quotation marks.

Behar's aversion to CSI was further revealed in numerous admissions at deposition and in documents produced during discovery. Behar stated that even before he wrote about CSI or Scientology, he "knew in [his] mind that it was a cult." Before publishing the *Forbes* article, Behar thought it "irresponsible" for anyone to be involved in the Church because of the "nature of the beast." Behar described the Church as among "the worst and most exploitative of the cults," "right up there with evil groups like Nazi Party and KKK," "little more than a criminal network," "train[ing] people to lie," "America's most notorious cult" and, breathtakingly, "the greatest and most bizarre scam of the 20th century."

CSI presented substantial evidence that Behar's actions in

gathering purported facts for the article were driven by his animus. He consistently sought out derogatory information, carefully avoided talking to persons whom he feared might contradict his negative sources, and actively suppressed any information that might cast doubt on the truth of his allegations. For example, one of the specific incidents described by Behar was a swindle perpetrated by Fishman, who was convicted for fraudulently submitting altered stock certificates in order to participate in class action recoveries. When caught, Fishman claimed to be an ex-Scientologist and concocted an exculpatory story that CSI made him do it. To support his "defense," Fishman paid another individual to impersonate a church official and make a taped telephone call directing Fishman to terminate the scam, murder his lawyer, and commit suicide. Behar reported the essence of the Fishman story as true, despite Behar's knowledge that the FBI had uncovered Fishman's attempted frame-up of CSI, that the assistant United States Attorney had branded Fishman's story a fabrication, and that the effort to frame CSI had collapsed when Fishman pleaded guilty to an obstruction of justice charge based upon his false attempt to frame CSI, and was sentenced to federal prison.[2]

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[2] In the version of the story Behar reported, the instruction was for Fishman to kill himself and his hypnotist-psychiatrist, instead of his lawyer. Fishman claimed this was a second instruction, issued after the conviction. Behar chose to report Fishman's claim without consulting the United States Attorney or the FBI about the purported second instruction, which the FBI also had investigated and found to have been fabricated, and without mentioning the conviction for obstruction of justice based upon the first falsely alleged "instruction."

Reasons for Granting the Writ

The court of appeals' opinion extends the scope of First Amendment protection to false and defamatory statements in ways well beyond and contrary to the jurisprudence of the Court.

First, by adhering to, expanding and constitutionalizing the so-called "subsidiary meaning doctrine," a legal theory invented by the Second Circuit and adopted by no other circuit, the court of appeals permits the media to make knowingly or recklessly false statements with impunity, so long as the statements can be classified as a subset of a larger "overall view." The only limitation the court of appeals would place on such a practice is that the writer's statement of his "overall view" itself be nonactionable, even if the reason is application of the actual malice doctrine, rather than truth. Thus, according to the court of appeals, a false and defamatory statement made *with* actual malice is protected by the First Amendment if a court concludes that the statement is "subsidiary in meaning" to a false and defamatory "overall view" expressed *without* actual malice.

Second, by adopting the district court's rationale that an author's bias is strong evidence of his *lack* of constitutional actual malice, a legal theory contrary to decisions of the Court, other circuits, and state supreme courts, the court of appeals encourages irresponsible journalistic jeremiads, rather than the search for truth which lies at the core of the rule of *New York Times* v. *Sullivan*, 376 U.S. 254 (1964).

Finally, by insisting on adherence to the actual malice requirement even where a defamation plaintiff agrees to seek

not substantial damages but merely a reputation-restoring judicial determination that defamatory statements are false, the court of appeals prevents a form of reputational vindication that would be consistent with the common law origins and history of the tort of defamation, as well as with the purpose and rationale of *Sullivan*, and which several judges and scholars have strongly advocated.

1. The Court of Appeals' Decision Creating a Constitutionally Mandated "Subsidiary Meaning Doctrine" Is Contrary to *Masson* v. *New Yorker Magazine*, 501 U.S. 496 (1991)

The court of appeals held that dismissal of the Vancouver claim was compelled under what it characterized as the "subsidiary meaning" doctrine, despite the district court's specific conclusion that the Vancouver statement was actionable under *Sullivan*. The court reasoned that since the "overall view" of the article was a sweeping indictment of CSI as a monument to greed and intimidation, the Vancouver statement was merely a "subsidiary" repetition of the general charge, and was therefore protected by the First Amendment under *Herbert* v. *Lando*, 781 F.2d 298, 312 (2d Cir. 1986) (*Lando II*), *cert. denied*, 476 U.S. 1182 (1986).

The "subsidiary meaning" doctrine, like the earlier "libel-proof" and "incremental harm" doctrines, is the invention of the Second Circuit; it has not been adopted by any other circuit or state appellate court. It was first applied, not as a formal "doctrine" but as a "ground of decision," in *Lando II*, under circumstances that were different from and far more benign

than those in the instant case. In this case, the court of appeals has expanded the language of *Lando II* and elevated it into a constitutionally mandated "doctrine." In creating this so-called doctrine, however, the court of appeals has defined and applied it in a manner indistinguishable from the incremental harm doctrine, which the Court, in *Masson*, held was not constitutionally mandated, and the libel-proof doctrine so trenchantly criticized in *Liberty Lobby, Inc.* v. *Anderson*, 746 F.2d 1563, 1568-69 (D.C. Cir. 1984) (Scalia, J.), *vacated on other grounds*, 477 U.S. 242 (1986).

As the court of appeals acknowledged, *Masson* explicitly held that the First Amendment does not compel adoption of the incremental harm doctrine. But "subsidiary meaning," argued the court of appeals, is so different from "incremental harm" that the First Amendment compels one, but not the other. Such a holding raises doctrinal hair-splitting to an art form.[3] The analytic links between and among the "libel-proof plaintiff," "incremental harm," and the newly-minted "subsidiary

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[3] The court of appeals' rationale leads it to engage in illogical and contradictory reasoning. In essaying to distinguish "subsidiary meaning" from "incremental harm," the court announces that the former, unlike the latter, "*does* bear upon" whether a defendant has not acted with actual malice. App. A, *infra*, 14a (emphasis in original). But the court ignores the district court's undisturbed holding that the Vancouver statements could have been, and thus must be presumed to have been, made with actual malice. Thus, even if the "overall view" was not published with actual malice, that conclusion cannot compel or "bear upon" a conclusion that the Vancouver statements were also made without actual malice, since the district court had explicitly held to the contrary.

meaning" doctrines are so close that it borders on the frivolous to argue that the doctrines have radically different First Amendment consequences.[4] As the Second Circuit itself acknowledged in *Lando II*, "Some may view our holding [on "subsidiary meaning"] as a variation of the 'libel-proof' doctrine...." 781 F.2d at 311, n. 10. Indeed. Like the incremental harm[5] and libel-proof doctrines,[6] the new theory attempts to eliminate claims based on statements that, in a court's view, are no worse, or add little of substance to, other

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[4] For examples of the massive semantic confusion among the doctrines, see Kevin L. Kite, *Note: Incremental Identities: Libel-Proof Plaintiffs, Substantial Truth, and the Incremental Harm Doctrine*, 73 N.Y.U. L. Rev. 529, 531 nn. 8-9 (1998). Many observers doubt that the doctrines are truly separate. *See* Smolla, *Law of Defamation*, § 9:61 at 9-44.1 (2d ed. 2000) (characterizing incremental harm doctrine as a "branch" of libel-proof doctrine); R. Sack & S. Baron, *Libel, Slander, and Related Doctrines* 2.4.18 at 2-65 (3d ed. 2000) (treating incremental harm doctrine as a "related . . . 'branch of the libel-proof doctrine'" (quoting *Lando II*)).

[5] The incremental harm doctrine was invented in *Simmons Ford, Inc.* v. *Consumers Union*, 516 F. Supp. 742 (S.D.N.Y. 1981), and was favorably noted in *Lando*, 781 F.2d at 311. It was rejected as a "bad idea" by Judge Scalia in *Liberty Lobby*, 746 F.2d at 1568-69, and by Judge Kozinski in *Masson* v. *New Yorker Magazine*, 960 F.2d 896, 898 (9th Cir. 1992).

[6] The libel-proof plaintiff doctrine immunizes false defamatory statements about a person whose reputation for the trait in question is already so bad that additional statements purportedly cannot make it worse. It is self-fulfilling in that prior false defamatory statements in the public record are used to protect new knowingly false statements about the same public figure, potentially *ad infinitum*. It was scathingly criticized by then-Judge Scalia in *Liberty Lobby, Inc.*, 746 F.2d at 1568-69.

statements that, for one reason or another, are nonactionable. In this case, the doctrines clearly overlap, for the Vancouver statement is in fact *not* logically subsidiary to the other, nonactionable statements; rather, it is substantially incremental to (and perhaps worse than) those statements. The court of appeals, however, by positing a broad "overall view," avoids using the term associated with the doctrine rejected in *Masson*.

All three "doctrines" are of dubious merit,[7] for they rest on the premise that reputation is monolithic and "stands or falls on its entirety." *Liberty Lobby*, 746 F.2d at 1568 (Scalia, J.). They are particularly pernicious where, as here, the otherwise actionable statement is deemed "subsidiary" or "incremental" to another statement whose truth cannot be judicially determined because of application of the actual malice doctrine. *Id.* In such instances, the prior existence in the public record of false defamatory statements about a plaintiff – in this case a church of a new religion subject to misunderstanding, suspicion, and prejudice – not only may serve to protect an author, under the actual malice doctrine, who repeats such statements, but also, in a self-fulfilling manner, may further protect that author if he makes knowingly false "incremental" or "subsidiary" allegations about that plaintiff. If, however, a plaintiff were permitted to prove that the new statements are

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[7] The libel-proof, incremental harm, and related doctrines are subjected to searching criticism because they are "based on faulty premises," "obfuscate the elements of defamation loss," and create "defamation untermenschen," in J. H. King, Jr., *The Misbegotten Libel-Proof Plaintiff Doctrine and the "Gordian-Knot" Syndrome*, 29 Hof. L. Rev. 343, 345-46 (2000).

false, the truthfulness of the nonactionable statements would also be called into question, assisting him in preserving his reputation.

Masson leaves it to the states to decide whether to adopt libel norms that are more protective than *Sullivan*. It should not matter whether the extension of *Sullivan* is effected by the "incremental harm doctrine," the "subsidiary meaning doctrine," the "libel-proof plaintiff doctrine" or some other invention of the court of appeals. Under *Masson*, all such efforts are matters of state law. Intentional falsehoods made with actual malice may be held nonactionable by the states (although no state has done so). There is, however, no federal common law of libel; federal judges lack the power to expand the qualified *Sullivan* privilege to statements made with actual malice. *Erie R. R. Co.* v. *Tompkins*, 304 U.S. 64 (1938).

Masson is but the most recent of a series of cases in which the Court has refused to extend constitutional limitations on state libel law beyond those already established by *Sullivan* and its immediate progeny. In *Sullivan* itself, the Court declined to grant First Amendment to protect conscious falsehoods. 376 U.S. at 279-82. *See also Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 340 (1974) (Powell, J.). While the Court extended the qualified First Amendment privilege to statements about public figures in *Curtis Publishing Co.* v. *Butts*, 388 U.S. 130, 155 (1967), it has refused to extend it to statements about private figures, except with respect to punitive damages and even then only when the statements concern public issues. *Gertz*, 418 U.S. at 342; *Dun & Bradstreet, Inc.* v. *Greenmoss Builders, Inc.*, 472 U.S. 749, 761 (1985).

Ever since *Sullivan*, however, counsel for media defendants have argued that the qualified privilege recognized in *Sullivan* does not go far enough. Proposals to extend First Amendment protection beyond *Sullivan* have included abolishing the tort of libel entirely;[8] recognizing an absolute privilege for certain significant speech[9] or for reporting newsworthy views;[10] providing virtually absolute protection for the expression of opinion;[11] and insulating statements made with actual malice when they involve a "libel-proof" plaintiff, cause only "incremental harm," or carry a mere "subsidiary meaning."

Although some courts, principally the Second Circuit, have occasionally agreed with media counsel,[12] the Court has rejected efforts to expand First Amendment protection beyond the contours defined in *Sullivan*. In both *Gertz* and *Dun & Bradstreet*, as noted above, the Court refused to displace state

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8/ Justices Black and Douglas argued that the very concept of libel was inconsistent with the First Amendment. *New York Times* v. *Sullivan*, 376 U.S. at 295-96.

9/ *See e.g.*, *McDonald* v. *Smith*, 472 U.S. 479 (1974).

10/ *Branzburg* v. *Hayes*, 408 U.S. 665 (1972).

11/ *See Ollman* v. *Evans*, 750 F.2d 970 (D.C. Cir. 1984).

12/ *See, e.g.*, *Cordillo* v. *Doubleday & Co.*, 518 F.2d 638, 639 (2d Cir. 1975) (libel-proof doctrine compelled by First Amendment); *Herbert* v. *Lando*, 568 F.2d 974 (2d Cir. 1977) (prohibiting discovery into editorial processes relevant to actual malice issue), *reversed*, 441 U.S. 153 (1979) (*Lando I*); *Herbert* v. *Lando*, 781 F.2d 298, 311 (2d Cir. 1986) (*Lando II*) (suggesting that incremental harm doctrine compelled by First Amendment).

law in private-figure libel actions. In *McDonald* v. *Smith*, the Court refused to recognize an absolute First Amendment privilege insulating consciously false statements addressed to public officials. In *Herbert* v. *Lando*, 441 U.S. 153 (1979) (*Lando I*), the Court rejected an effort to block discovery necessary to establish actual malice. In *Milkovich* v. *Lorain Journal Co.*, 497 U.S. 1 (1990), the Court rejected an attempt to create absolute immunity for statements couched as opinion. Finally, in *Masson*, the Court held that the First Amendment does not compel adoption of the incremental harm doctrine.

The court of appeals' insistence that the First Amendment requires application of a "subsidiary meaning doctrine" to dismiss libel claims founded on purportedly "subsidiary" statements made with actual malice thus fundamentally misconceives and misapplies the Court's jurisprudence. The court of appeals rested its decisions on its prior opinion in *Lando II*, which it insisted "is still the law of this Circuit" (App. A, *infra*, 15a), despite *Masson*.[13] But *Lando II* did not go nearly as far as the decision in this case; to the extent that it compels the result here, it cannot be maintained after *Masson*.

Lando II involved eleven statements repeating a discrete factual allegation: that the plaintiff in that case – Colonel Herbert – lied about reporting war crimes to his superiors in

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[13] *Lando* is a thin reed, indeed, for the court of appeals to rest upon, given that the Court twice has explicitly disapproved of the Second Circuit's efforts to expand the scope of *Sullivan* in that case, in *Lando I* (reversing the Circuit's holding prohibiting discovery of actual malice) and in *Masson* (rejecting the incremental harm doctrine suggested in *Lando II*).

Vietnam and that his removal from command, therefore, was for other reasons. Nine of the statements were not actionable under *Sullivan*. The *Lando II* court dismissed the claims based on the two remaining statements because, although false, they merely provided evidentiary support for the specific, closely related factual allegations made in the nonactionable statements.[14] The court cautioned, "We do not intend by our holding to permit defamation defendants to freely embellish their stories with falsehoods while remaining free from liability." 781 F.2d at 312.[15]

With that caution, the holding in *Lando II* may well be characterized, as it was by Judge Kozinski, as "quite unexceptional" because the two remaining statements "merely impl[ied] the *identical* view" as the nine nonactionable statements. *Masson* v. *New Yorker Magazine*, 895 F.2d 1535, 1565-66 (9th Cir. 1989) (Kozinski, J., dissenting). As Judge Kozinski warned, "This is a far cry from saying ... that *any* statement in a publication cannot be defamatory if the publication already contains a statement that is equally

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[14] The first of the two statements at issue was that another officer "had no sons" in the military and therefore, contrary to what Herbert had alleged, had no reason to protect his sons' careers by lying about Herbert's failure to report war crimes; the second was that Herbert never told other officers that he had reported war crimes to his superiors.

[15] The court elaborated, "We would have a very different case if a statement, otherwise actionable, implied that Herbert ... had lied on some significant matter unrelated to the truth of statements determined not to be actionable." *Id.* at 312, n. 12.

defamatory but unactionable...." *Id.*

The court of appeals in this case, however, applied *Lando II* in precisely the manner against which Judge Kozinski – and, indeed, *Lando II* itself – warned. Unlike in *Lando II*, the *Time* article makes a sweeping indictment of CSI as an institution rife with greed and intimidation, and supports the general indictment with a series of free-standing, specific factual allegations. The Vancouver statements do not repeat previous allegations, nor do they "merely lend weight to the sting from the nonactionable portions," as did the statements at issue in *Lando II*. J.H. King, Jr., *The Misbegotten Libel-Proof Plaintiff Doctrine and the "Gordian-Knot" Syndrome*, 29 Hof. L. Rev. 343, 389-90 (2000). Indeed, they are unique, in suggesting that CSI preys on the general public, as opposed to "believers worldwide"; accordingly they are set forth in a separate sidebar. Unlike the two closely related collateral statements at issue in *Lando II*, it is impossible to assert that the Vancouver sidebar does not further damage CSI's reputation. Under the court of appeals' decision in this case, the presence of any extremely broad "overall view" that happens to be nonactionable will create a constitutionally protected license to lie about the specifics, since the specific allegations will be deemed "subsidiary" to the "overall view." Certiorari should be granted to insure that this Court's decision in *Masson* is not undermined and effectively overruled by such a rule.

2. The Court of Appeals' Decision Creates a Safe Harbor for Biased Journalism and Deprives Defamation Plaintiffs of Their Rights to Jury Trial.

In affirming the district court's order granting partial summary judgment, the court of appeals approved the district court's holding that Behar's anti-Scientology bias "and even his exaggerations, enhances, rather than diminishes, the likelihood that" his defamatory statements were made without actual malice. (App. A, 10a). This astonishing conclusion is unwarranted by *Sullivan*, conflicts with post-*Sullivan* decisions, is not compelled by the First Amendment, and is contrary to the purposes the First Amendment is intended to serve. *Sullivan*'s crucial distinction between unintentional falsehoods and knowing or reckless falsehoods (*i.e.*, between error and misconduct) is subverted if bias becomes a means of rebutting a claim of actual malice. *Sullivan* teaches that the First Amendment protects the search for truth in the free market place of ideas. The courts below, in creating a strong presumption that an author's bias shields him from liability for defamatory statements, turn *Sullivan* on its head. Their holdings, rather than encouraging the search for truth, provide a safe harbor for biased journalism, in sharp conflict with *Harte-Hanks Communications* v. *Connaughton*, 491 U.S. 657, 667-68, 692 (1989).

While, under certain circumstances, it *might* be a permissible inference that an author's bias shows that he actually believed in the truth of the false statements he wrote, such bias also supports the inference that the author knowingly misrepresented the truth, or recklessly avoided or disregarded

it. Since "the drawing of legitimate inferences from the facts are jury functions, not those of a judge," especially on a motion for summary judgment, *Anderson* v. *Liberty Lobby*, 477 U.S. 242, 255 (1986), the question of which way an author's bias cuts ordinarily is a jury question. *Harte-Hanks*, 491 U.S. at 667-68. Moreover, an author's bias, when, as here, it was known to his editors, can hardly serve to shield the publication itself from liability.

The question of the meaning and weight to be given to a libel defendant's ill will or bad motives in determining actual malice under *Sullivan* has been the subject of substantial disagreement and controversy in the state and lower federal courts, and itself cries out for plenary review and resolution by the Court. The conflicting viewpoints were set forth in the panel and en banc decisions in *Tavoulareas* v. *Piro*, 759 F.2d 90 (D.C. Cir. 1985) (panel), 817 F.2d 762, 795 (D.C. Cir. 1987) (*en banc*). The panel held that common law malice is almost always admissible "evidence" of actual malice "because it provides a *motive* for knowing or reckless falsehood." 759 F.2d at 117 (emphasis in original).[16] To the panel, it was "beyond

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[16] The panel pointed to such cases as *Goldwater* v. *Ginzburg*, 414 F.2d 324, 342 (2d Cir. 1969) ("evidence of ... motive and intent" may help establish actual malice); *Cochran* v. *Indianapolis Newspapers, Inc.*, 175 Ind.App. 548, 560, 372 N.E.2d 1211, 1220 (1978) (ill will "relevant and admissible as evidence in the determination of whether defendant possessed a state of mind conducive to reckless disregard of falsity"); and *Sprouse* v. *Clay Communications, Inc.*, 158 W.Va. 427, 211 S.E.2d 674, 688 (1975) ("personal motive ... is evidence of recklessness and willful disregard of truth which may be considered along with other evidence on the question of

question that one who is seeking to harm the subject of a story ... is more likely to publish recklessly than one without such motive." 759 F.2d at 118. The *en banc* majority was more cautious. While it recognized the relevance of evidence of ill will, it feared that such evidence, standing alone, might be unduly prejudicial and in any event would be insufficient to meet the clear and convincing evidentiary standard of *Sullivan*. It acknowledged, however, that "*under some circumstances*, the probative value of ill-will evidence" requires its admission, but only when "combined with other, more substantial evidence of a defendant's bad faith." 817 F.2d at 795.

In *Harte-Hanks* the Court addressed the question, but did not decisively resolve the conflict. It held that evidence of ill will or motive "bear[s] ... relation to the actual malice inquiry," but warned against placing "too much reliance on such factors" in the absence of corroborating evidence, 491 U.S. at 668, which it found to exist in that case. *Id.* at 692.

Subsequent decisions in the state and federal courts reflect the continuing uncertainty and conflict over the question.[17] Indeed, several federal circuits, in clear disregard of *Harte-Hanks* and in direct conflict with post-*Hanks* state supreme court decisions and with other federal circuits,[18] recently have

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actual malice").

[17] Compare, *e.g.*, cases cited in notes 18 and 19, *infra*.

[18] State supreme courts decisions include *Currier* v. *Western Newspapers, Inc.*, 175 Ariz. 290, 294, 855 P.2d 1351, 1355 (1993) (jury question existed as to whether defendant "intended to build his reputation as a journalist by

held that evidence of ill will has no relevance to determinations of actual malice.[19] In none of these cases, however, nor in either opinion in *Tavoulareas*, did any court suggest what the court of appeals held in this case: that ill will or bias should be

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destroying [plaintiff]," because "ill will may be circumstantial evidence of actual malice" and "evidence concerning motive is relevant to actual malice") (citing *Harte-Hanks*, 491 U.S. at 667-668); *Hinerman* v. *Daily Gazette Co., Inc.*, 188 W.Va. 157, 170, 423 S.E.2d 560, 573 (1992) ("partisanship, ill will towards the subject of a libel, and other 'malicious' motives may be considered by the jury in their determination of whether a subjective realization that the statement was false or ... published recklessly, existed at the time the statement was published"); and *Herron* v. *King Broadcasting Co.*, 776 P.2d 98, 106-07, 17 Media L. Rep. (BNA) 1289, 1296 (Wash. 1989) (summary judgment for defendant reversed because evidence of reporter's hostility "bolster[ed] the inference that [he] might have been reckless regarding his statements, and support[ed] the conclusion that [plaintiff] succeeded in offering sufficient evidence of malice to go to the jury"). Federal circuit decisions include *Duffy* v. *Leading Edge Products, Inc.*, 44 F.3d 308, 315 n. 10 (5th Cir. 1995) ("Although we recognize that proof of ill will or animosity is not *required* to show actual malice, evidence of ulterior motive can often bolster an inference of actual malice") (internal citation omitted) (emphasis in original), and *Perk* v. *Reader's Digest Ass'n, Inc.*, 931 F.2d 408, 411 (6th Cir. 1991) (the defendant's motive is "circumstantial evidence which, when combined with other evidence, may amount to malice").

[19] See, *e.g.*, *Dunn* v. *Air Line Pilots Ass'n*, 193 F.3d 1185, 1198 n.17 (11th Cir. 1999) ("Ill-will, improper motive or personal animosity plays *no role* in determining whether a defendant acted with 'actual malice'") (emphasis added); *Shoen* v. *Shoen*, 48 F.3d 412, 417 (9th Cir. 1995) (since ill will "cannot, without more, establish actual malice," evidence concerning defendant's "attitude towards plaintiffs" was "not clearly relevant").

considered as strong evidence of an *absence* of actual malice, justifying summary judgment on behalf of a defendant except where a plaintiff can demonstrate a countervailing "*extreme* departure from standard investigative techniques" (App. A, *infra*, 10a) (emphasis added). The court of appeals' legal standard is its own invention, is unsupported by any precedent, and is contrary to *Harte-Hanks*, which clearly approves use of such evidence to support a triable inference of the existence of actual malice, not a strong legal presumption that actual malice is absent. *See id.*, 491 U.S. at 668 ("a plaintiff is entitled to prove the defendant's state of mind").

In this case, in addition to showing Behar's ill will, CSI presented abundant and powerful evidence in opposition to *Time's* summary judgment motion "to permit the conclusion that defendant in fact entertained serious doubts as to the truth of his publication." *St. Amant* v. *Thompson*, 390 U.S. 727, 731 (1968). Most dramatic was the evidence concerning the statements about Steven Fishman, who was convicted of engineering a class action stock scam.

The article stated that "Scientology denies any tie to the Fishman scam" but then reported that this denial was "strongly disputed by both Fishman and his longtime psychiatrist," Uwe Gertz (*Id*). The article further reported that Fishman and Geertz "claim that when arrested, Fishman was ordered by the Church to kill Geertz" and then to commit suicide. (*Id.*) The article plainly suggested that CSI's denials were false.[20]

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[20] This section of the article fell under an earlier opening which stated: "To gain influence and lure richer, more sophisticated followers,

Omitted from the article was the fact that Fishman was in jail not only for his stock scam, but also because he had pleaded guilty to obstruction of justice for his efforts to blame the Church for his fraudulent scam by concocting threats on his life, purportedly made by the Church. Specifically, Behar knew that Fishman had attempted to frame CSI by paying an accomplice, who pretended to be acting on behalf of CSI and phoned Fishman with concocted threats and the concocted order to kill his lawyer and commit suicide. (Fishman taped the staged conversation, but the FBI discovered his plot.) Thus, contrary to the implication of the article, not only was CSI clearly not involved in the class action scam, but Behar knew that Fishman pleaded guilty to obstruction of justice for trying to implicate the Church in threats on the lives of Fishman and his lawyer. Amazingly, the article never even mentioned that fact.

The court of appeals based its affirmance principally on the fact that Behar had interviewed Robert Dondero, the Assistant United States Attorney who prosecuted Fishman, and Geertz (App. A, 11a), purportedly thus demonstrating that Behar's bias did not prevent him from conducting a meaningful investigation. But the court silently ignored the undisputed evidence that even though Behar interviewed Dondero, what Dondero told him was that CSI was not involved in the scam; that Dondero stated in open court at Fishman's sentencing hearing that Fishman had created the story of the instruction to commit murder and suicide out of whole cloth; that Behar failed

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Scientology has lately resorted to a wide array of front groups and financial scams. Among them:"

to read significant portions of the transcript of that sentencing hearing or to interview or read the affidavits of the FBI agents who investigated the allegations of both "instructions"; and that Behar had learned, but chose to ignore, that Geertz had been taken in by other lies of Fishman, including that Fishman knew of three individuals who allegedly had been murdered by the Church.[21] Thus, the very facts upon which the court of appeals relied provide strong inferences from which a jury properly could conclude that Behar "in fact entertained serious doubts as to the truth of his publication," *St. Amant*, 390 U.S. at 731, that, due to his preconceived animus, he conducted a selective investigation which "was a product of deliberate decision not to acquire knowledge of facts that might confirm the probable falsity of [his] charges," *Harte-Hanks*, 491 at 692, and that even when there were "obvious reasons to doubt the veracity of the informant or the accuracy of his reports" (*id.* at 688), Behar included the false statements.

The court of appeals' decision thus flies in the face of *Liberty Lobby*, where the Court held that juries, not judges, must resolve conflicting factual inferences, and *Harte-Hanks*, where the Court found that sufficient evidence of actual malice could be found from the newspaper's bias as well as its failure to interview a key witness, its disregard of statements by other witnesses, and its failure to review audiotapes and other

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[21] Geertz, purportedly believing Fishman, reported the alleged murders to the FBI, which investigated them. As Dondero told the court that sentenced Fishman, no such murders took place. Behar failed to interview the FBI agents with respect to this lie as well.

evidence. By permitting Behar and *Time* to escape a jury trial on the basis that as a matter of law Behar's bias sufficiently *negates* actual malice to justify denial to CSI of its right to a jury trial on that issue, the court of appeals invites irresponsible false speech without protecting the core speech values that lie at the core of *Sullivan*.

3. The Court Should Clarify That *Sullivan* Does Not Mandate Application of the Actual Malice Rule to Actions to Redeem Reputation by a Finding of Falsity and an Award of Nominal Damages[22]

Sullivan holds that the First Amendment prevents a state from awarding substantial damages against defendants who speak falsely but in good faith. Nothing in *Sullivan*, however, suggests that the First Amendment conflicts with a plaintiff's independent right, long recognized by the common law, to seek nominal damages as a means of establishing that the charges leveled against it are false; indeed, the very rationale of *Sullivan* supports the continued recognition of that right. Where, as here, reputation and public discourse are endangered by falsehood, the availability of nominal damages functions as a guardian of truth. The court of appeals' holding misconceives *Sullivan* by making the issue of truth or falsity a hostage to the availability of substantial damages.

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[22] The court of appeals rejected CSI's argument on this point *on the merits*, holding that a public figure plaintiff must prove actual malice even to recover nominal damages. App. A, 16a, n.3. As CSI argued below, the claim was inherent in CSI's original complaint, and the district court, at the least, had supplementary jurisdiction over it.

At common law, even where substantial libel damages were unavailable or denied, courts nevertheless awarded nominal damages to permit a plaintiff to vindicate reputation through a declaration of falsity.[23] New York's experience is illustrative:

> A verdict for any amount for the plaintiff of necessity determines the falsity of the article as applied to the plaintiff, and clearly vindicates her reputation.

Butler v. *Gazette Co.*, 104 N.Y.S. 637, 642 (3d Dept 1907).[24]

The common law recognized an important distinction between awarding substantial damages in libel cases, and utilizing nominal damages as a means to vindicate reputation. A plaintiff's interest in reputational vindication survives a determination that substantial damages are unavailable. Money,

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[23] *See, e.g.*, 2 Harper, James & Gray, *The Law of Torts* § 5.30 at 251 (2d ed. 1986) ("The action for defamation performs a vindicatory function ...."); Frederick Pollock, *The Law of Torts* 204 (1887) ("Reputation and honor are no less precious to good men than bodily safety and freedom. In some cases they may be dearer than life itself. This is needful for the peace and well-being of a civilized commonwealth that the law should protect the reputation as well as the person of the citizen").

[24] *See also Abell* v. *Cornwall Industrial Corp.*, 150 N.E. 132, 134 (N.Y. 1925); *Rusciano & Son Corp.* v. *Mihalyfi*, 1 N.Y.S.2d 787 (Sup. Ct. Bronx Co. 1938); *Zator* v. *Buchel*, 247 N.Y.S. 686 (3d Dept 1931). *See generally* Ernest Seelman, *The Law of Libel and Slander in the State of New York* 447 (1964) (nominal damage award appropriate "[w]here the plaintiff merely asks for vindication").

even a great deal of money, is often less effective in repairing a tarnished reputation than a judicial declaration that the charges have been proven false.

While *Sullivan* displaced aspects of the common law, it did so only where robust speech might be chilled by a fear of ruinous damage liability, as occurred in *Sullivan* itself. Its holding was directed to protect against such awards, not to bar a determination of falsity supported by nominal damages. The opinion opens by questioning "the extent to which the constitutional protections for speech and press limit a State's power *to award damages* in a libel action brought by a public official," and closes with the holding "that the Constitution delimits a State's power *to award damages* for libel ..." 376 U.S. at 256, 283 (emphasis added). Other statements confirm the monetary focus of the Court's concern.[25]

There is no risk of ruinous damages in a nominal damage case, and hence there is no reason to displace the common law remedy of nominal damages by imposing a requirement of actual malice.[26] Freed from the risk of ruinous damage

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[25] *See id.* at 277 ("The fear of damage awards ... [may be] ... inhibiting"); *id.* at 279-80 ("The constitutional guarantees require, we think, a federal rule that prohibits a public official *from recovering damages* for a defamatory falsehood ... unless he proves ... 'actual malice'") (emphasis added).

[26] *Time*'s argument below that the First Amendment and *Sullivan* protect it not only from "ruinous" damage awards in the absence of actual malice, but also from the burden and expense of defending common law libel tort actions, was rejected in *Herbert* v. *Lando*, 441 U.S. 153, 175-77 (1979).

recovery, there is no reason to shield a defendant from defending the truth of damaging allegations. *See* Leval, *The No-Money No-Fault Libel Suit,* 101 Harv. L. Rev. 1287, 1289 (1988) ("The purpose of the malice requirement was not to protect falsity from exposure, but to protect the press from intimidation or annihilation by money judgments."). Justice White expressly stated his view that the common law's recognition of a reputation-clearing award of nominal damages survives *Sullivan. See Dun & Bradstreet,* 472 U.S. at 772 (White, J., concurring) ("Nothing in the central rationale behind *New York Times* demands an absolute immunity from suits to establish the falsity of a defamatory misstatement about the public figure where the plaintiff cannot make out a jury case of actual malice"). *See also* Franklin, *A Declaratory Judgment Alternative to Current Libel Law*, 74 Cal. L. Rev. 809 (1986).

Thus, the rule established in *Sullivan* shields defendants from the potentially ruinous effects of substantial damage awards, and there is simply no conflict between the First Amendment and the availability of nominal damages. What is more, the truth-telling purposes underlying the free speech clause are themselves reinforced by the availability of damages in common law libel.[27] As the Court made plain in *Gertz*, "there

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[27] For a sampling of the abundant literature calling for greater attention to the truth protective function of the law of libel, *see e.g.*, Pierre N. Leval, *The No-Money No-Fault Libel Suit, supra*; James H. Hulme, *Vindicating Reputation: An Alternative to Damages as a Remedy for Defamation*, 30 American U.L. Rev. 375 (1981); David A. Barret, *Declaratory Judgments for Libel: A Better Alternative*, 74 Calif. L. Rev. 847 (1986); Marc Franklin, *Good Names and Bad Law: A Critique of the Libel Law and a*

is no constitutional value in false statements of fact. Neither the intentional lie nor the careless error materially advances society's interest in 'uninhibited, robust and wide-open' debate on public issues." 418 U.S. at 340 (quoting *Sullivan*, 376 U.S. at 270). The absence of constitutional worth for falsehoods provides the state with a compelling interest in providing a plaintiff with a forum to rebut false defamatory speech. See, *e.g.*, *McIntyre* v. *Ohio Elections Comm'n*, 514 U.S. 334, 349 (1995) (state's interest in preventing libel and false statements "carries special weight during election campaigns when false statements, if credited, may have serious adverse consequences for the public at large").

The free speech clause, by preventing libel damage rules that chill robust speech, ultimately seeks to assure that false speech will be proven false through the public discourse on which democracy depends. Thus, once speakers are insulated from substantial damages for good faith errors, the First Amendment is advanced, not retarded, by granting the target of a false charge an opportunity to set the record straight through an award of nominal damages. To allow demonstrable falsehoods to go unchallenged merely because the First Amendment makes substantial damages unavailable would risk distortion of robust public discourse.

Proposal, 18 U.S.F.L. Rev. 1 (1983); Franklin, *A Declaratory Judgment Alternative, supra*; David A. Anderson, *Reputation, Compensation and Proof*, 25 Wm & Mary L. Rev. 747 (1984).

CONCLUSION

For the reasons stated, the petition for writ of certiorari should be granted.

Dated: May 7, 2001

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term 1999
(Argued December 6, 1999 Decided January 12, 2001)
Docket Nos. 98-9522(L), 99-7332(CON)

CHURCH OF SCIENTOLOGY INTERNATIONAL,
Plaintiff-Counter-Defendant-Appellant,

– v. –

RICHARD BEHAR,
Defendant-Counter-Claimant-Appellee,

TIME WARNER, INC., TIME INC. MAGAZINE CO.,
Defendants-Appellees.

Before:

WALKER, *Chief Judge*
CABRANES and PARKER, *Circuit Judges.*

JOHN M. WALKER, JR., *Chief Judge*:

Plaintiff-appellant Church of Scientology International ("CSI") appeals from judgments of the district court for the Southern District of New York (Peter K. Leisure, *District Judge*) dismissing appellant's libel complaint. Because we find that the challenged statements were not published with actual malice or were subsidiary in meaning to statements made without actual malice, we affirm the judgments of the district court.

BACKGROUND

On May 6, 1991, *Time* magazine published a 10-page, 7500-word cover article entitled "Scientology: The Cult of Greed" (the "Article"). The Article, written by defendant-appellee Richard Behar ("Behar"), was highly critical of Scientology, which it described as "pos[ing] as a religion" but being "really a ruthless global scam," and narrated various instances of wrongdoing by a number of individual Scientologists. CSI filed a complaint alleging libel against Behar and defendants-appellees Time Inc. Magazine Co. and its parent company Time Warner, Inc. (collectively, "Time"). The complaint alleged as false and defamatory the following statements from the Article:

Paragraph 40 of the Complaint

1. "[T]he church ... survives by intimidating members and critics in a Mafia-like manner."

2. "'Scientology is quite likely the most ruthless, the most classically terroristic ... cult the country has ever seen.'"

3. "Those who criticize the church – journalists, doctors,

lawyers and even judges – often find themselves ... framed for fictional crimes, beaten up or threatened with death."

Paragraph 45 of the Complaint

4. "Occasionally a Scientologist's business antics land him in jail. Last August a former devotee named Steven Fishman began serving a five-year prison term in Florida. His crime: stealing blank stock confirmation slips from his employer, a major brokerage house, to use as proof that he owned stock entitling him to join dozens of successful class-action lawsuits. Fishman made roughly $1 million this way from 1983 to 1988 and spent as much as 30% of the loot on Scientology books and tapes."

"Scientology denies any tie to the Fishman scam, a claim strongly disputed by both Fishman and his longtime psychiatrist, Uwe Geertz, a prominent Florida hypnotist. Both men claim that when arrested, Fishman was ordered by the church to kill Geertz and then do an 'EOC,' or end of cycle, which is church jargon for suicide."

Paragraph 52 of the Complaint

5. "One source of funds for the Los Angeles-based church is the notorious, self-regulated stock exchange in Vancouver, British Columbia, often called the scam capital of the world."

6. "Baybak, 49, who runs a public relations company staffed with Scientologists, apparently has no ethics problem with engineering a hostile takeover of a firm he is hired to promote."

7. "'What these guys do is take over companies, hype the stock, sell their shares, and then there's nothing left....'"

   "... 'They stole this man's property.'"

Paragraph 58 of the Complaint

8. "THE LOTTICKS LOST THEIR SON, Noah, who jumped from a Manhattan hotel clutching $171, virtually the only money he had not yet turned over to Scientology. His parents blame the *172 church and would like to sue but are frightened by the organization's reputation for ruthlessness."

9. "His death inspired his father Edward, a physician, to start his own investigation of the church. 'We thought Scientology was something like Dale Carnegie,' Lottick says. 'I now believe it's a school for psychopaths. Their so-called therapies are manipulations. They take the best and brightest people and destroy them.'"

10. "It was too late. 'From Noah's friends at Dianetics' read the card that accompanied a bouquet of flowers at Lottick's funeral. Yet no Scientology staff members bothered to show up."

Paragraph 62 of the Complaint

11. "The next month the Rowes flew to Glendale, Calif., where they shuttled daily from a local hotel to a Dianetics center. 'We thought they were brilliant people because they seemed to know so much about us,' recalls Dee. 'Then we realized our hotel room must have been bugged.' After bolting from

the center, $23,000 poorer, the Rowes say, they were chased repeatedly by Scientologists on foot and in cars."

Paragraph 67 of the Complaint

12. "In a court filing, one of the cult's many entities – the Church of Spiritual Technology – listed $503 million in income just for 1987."

In June of 1992, the defendants moved to dismiss the complaint on the grounds that the statements, none of which mentioned CSI by name, were not of and concerning CSI. On November 23, 1992, the district court granted the motion to dismiss in part, finding that certain of the statements complained of could not be read as referring to CSI. *Church of Scientology Int'l* v. *Time Warner, Inc.*, 806 F. Supp. 1157 (S.D.N.Y. 1992) ("*Time I*"). Specifically, the court found that parts of statement 4 and all of statements 6, 7, 11, and 12 could not reasonably be considered to be of and concerning CSI. *See id.* at 1162- 64. Defendants then answered the complaint, and Behar asserted counterclaims against CSI for harassment and violation of the Fair Credit Reporting Act, 15 U.S.C. § 1681. The parties agreed to focus discovery on the issue of actual malice and to defer discovery on the issue of truth and falsity.

After two and a half years of discovery, the district court granted summary judgment to defendants as to all of the remaining statements, except for statement 5, on the grounds of lack of actual malice. *Church of Scientology Int'l* v. *Time Warner, Inc.*, 903 F. Supp. 637, 642-44 (S.D.N.Y. 1995) ("*Time II*"). On reconsideration, the district court granted summary judgment to defendants on statement 5, that the Vancouver

Stock Exchange (the "VSE") was one source of funds for the church (the "VSE statement"), based on the subsidiary meaning doctrine, and dismissed the complaint. *Church of Scientology Int'l* v. *Time Warner, Inc.*, 932 F. Supp. 589, 595 (S.D.N.Y. 1996) ("*Time III*").

CSI then moved for an order modifying the district court's opinion in *Time III*, arguing that it was now stating a claim for nominal damages, for which it did not need to prove actual malice. The district court declined to address the merits of the claim because it found CSI's motion to be a procedurally defective motion for reargument. *Church of Scientology Int'l* v. *Time Warner, Inc.*, No. 92 Civ. 3024, 1997 WL 538912, at *2 (S.D.N.Y. Aug. 27, 1997) ("*Time IV*").

On September 9, 1997, CSI moved for leave to amend the complaint to assert a claim for nominal damages premised on a finding that the disputed statements were demonstrably false. The district court denied the motion, holding that allowing CSI to amend its complaint five years after it brought the action, and after summary judgment had been granted against it, would be unduly prejudicial to the defendants. *Church of Scientology Int'l* v. *Time Warner, Inc.*, 1998 WL 575194, at *3 *173 (S.D.N.Y. Sept. 9, 1998) ("*Time V*"). The district court also held that amendment would be futile, since a public figure claiming even nominal damages is still required to demonstrate actual malice under *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 297-98, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964). *See Time V*, 1998 WL 575194, at *4-5. Although Behar's counterclaims were still pending, the parties agreed that these claims would be dismissed without prejudice, on the understanding that they

could be refiled should the complaint be reinstated. CSI moved for the district court to enter a final judgment dismissing its complaint. The court granted the motion, *Church of Scientology Int'l* v. *Time Warner, Inc.*, No. 92 Civ. 3024, 1999 WL 126450, at *2 (S.D.N.Y. Mar. 9, 1999), and this appeal followed.

DISCUSSION

On appeal, CSI challenges the district court's rulings in *Time I* through *Time V* on the grounds that the district court (1) improperly ruled that portions of the Article's allegedly defamatory statements were not of and concerning CSI, (2) improperly disregarded CSI's evidence that the statements were made with purposeful avoidance of the truth, (3) committed plain error in dismissing the VSE statement under the subsidiary meaning doctrine, and (4) erred in refusing to permit CSI to pursue a claim for nominal damages premised on a finding of falsity. CSI has not appealed the district court's decision with respect to statements 11 and 12.

Libel, a method of defamation expressed in writing or print, is a common law cause of action and applies separate standards to plaintiffs who are private individuals and those who are public figures. *See Celle* v. *Filipino Reporter Enters., Inc.*, 209 F.3d 163, 176 (2d Cir. 2000). CSI concedes that it is a public figure; therefore to prevail it must show that the statements it complains of were (1) of and concerning CSI, (2) likely to be understood as defamatory by the ordinary person, (3) false, and (4) published with actual malice, that is, either knowledge of falsity or reckless disregard of the truth. *See id.* In contrast, a private plaintiff need only prove that false and defamatory

statements of and concerning the plaintiff were made with gross negligence. *See Karaduman* v. *Newsday, Inc.*, 51 N.Y.2d 531, 539, 435 N.Y.S.2d 556, 416 N.E.2d 557 (1980).

Of these inquiries, the first two should ordinarily be resolved at the pleading stage, while resolution of the falsity and actual malice inquiries typically requires discovery. In this case, we hold that CSI has failed to establish actual malice as to the statements identified in paragraphs 40, 45, and 58 of the Complaint, and as a result, CSI's claims based on the remaining statements, contained in paragraph 52, are barred by the subsidiary meaning doctrine. Accordingly, we do not reach the question whether any of these statements is "of and concerning" CSI.[1/]

[1/] To the extent that the Behar Article uses the term"Scientology," Chief Judge Walker is of the view that the term as used denotes a belief system, or, as the Article puts it, a "cult," and that therefore references to "Scientology" are not "of and concerning" the plaintiff Church of Scientology International of Los Angeles, California. This is true as surely as invective directed generally at Catholicism cannot be considered defamatory of an individual Catholic or a particular parish church; such "group libels" are not actionable by discrete members of the group. *See National Nutritional Foods Ass'n* v. *Whelan*, 492 F. Supp. 374, 380 (S.D.N.Y. 1980); *Brady* v. *Ottaway Newspapers, Inc.*, 84 A.D.2d 226, 445 N.Y.S.2d 786, 788-92 (1981). Chief Judge Walker also believes that the district court correctly concluded that the Article's references to individual Scientologists could not be "of and concerning" CSI. *See AIDS Counseling & Testing Ctrs.* v. *Group W. Television, Inc.*, 903 F.2d 1000, 1005 (4th Cir. 1990) (holding that "[a]llegations of defamation by an organization and its members are not interchangeable" (internal quotation marks omitted)).

Under New York Times, a public figure plaintiff must prove that an allegedly libelous statement was made with actual malice, that is, made "with knowledge that it was false or with reckless disregard of whether it was false or not." *New York Times*, 376 U.S. at 280, 84 S.Ct. 710. This showing must be made by clear and convincing evidence. *See Celle*, 209 F.3d at 183. Despite its name, the actual malice standard does not measure malice in the sense of ill will or animosity, but instead the speaker's subjective doubts about the truth of the publication. *See Masson* v. *New Yorker Magazine, Inc.*, 501 U.S. 496, 510, 111 S.Ct. 2419, 115 L.Ed.2d 447 (1991) ("Actual malice under the *New York Times* standard should not be confused with the concept of malice as an evil intent or a motive arising from spite or ill will."). If it cannot be shown that the defendant knew that the statements were false, a plaintiff must demonstrate that the defendant made the statements with reckless disregard of whether they were true or false. The reckless conduct needed to show actual malice "is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing," *St. Amant* v. *Thompson*, 390 U.S. 727, 731, 88 S.Ct. 1323, 20 L.Ed.2d 262 (1968), but by whether there is sufficient evidence "to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication," *id.*

The *St. Amant* Court found the following factors to be relevant to a showing that the defendant harbored actual malice: (1) whether a story is fabricated or is based wholly on an unverified, anonymous source, (2) whether the defendant's allegations are so inherently improbable that only a reckless

person would have put them in circulation, or (3) whether there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports. *See id.* at 732, 88 S.Ct. 1323.

CSI argues that Behar had a negative view of Scientology, and that his bias pervaded his investigation and caused him to publish false and defamatory statements about CSI. The district court found that the evidence could not support such a claim. The district court found that Behar's alleged bias would be relevant to show a purposeful avoidance of the truth if it were coupled with evidence of an extreme departure from standard investigative techniques. The district court concluded, however, that "plaintiff has failed to demonstrate the correlative circumstance of inadequate investigation to make its evidence of bias probative of actual malice, rather than probative of lack thereof," *Time II*, 903 F. Supp. at 641, noting also that the "speaker's belief in his statements, even his exaggerations, enhances, rather than diminishes, the likelihood that they are protected," *id.* We believe that the district court properly applied the actual malice standard, and turn to the statements themselves.

The "Intimidation" Statements. The district court found that Behar had relied on (1) "affidavits from former high-ranking Scientologists, newspaper and periodical articles, interviews and personal experience, and published court opinions" to support statement 1 (mafia-like intimidation), (2) the judgment of Cynthia Kisser, an executive director of an organization dedicated to the study of cults, which was likely to be given credence by Behar in view of her knowledge and experience, for statement 2 ("classically terroristic"), and (3) Behar's

personal experience and research to support statement 3 (retaliation against journalists, lawyers, doctors and judges). *Id.* at 642-43. In view of the evidence in the record of Behar's extensive research, we agree with the district court's conclusion that no reasonable jury could find that defendants either knew or entertained serious doubts that these statements were false.

The Fishman Statements. The part of the Fishman statement that pertained to Fishman's stock scam (paragraph 45, statement 4) was not published with actual malice. Behar interviewed Steven Fishman, Robert Dondero, the Assistant *175 United States Attorney that prosecuted Fishman for stock fraud, and Marc Nurik, the attorney that represented Fishman. As the district court observed, Behar relied on these interviews. *See id.* at 644. He had no reason to have serious doubts about the truth of the information given him by the prosecuting attorney, the defense attorney, and the defendant in the case.

Nor were the murder-suicide allegations published with actual malice. Behar interviewed Fishman's psychiatrist, Uwe Geertz, and Vicki Aznaran, a former high-ranking Scientologist. CSI argues that Behar had evidence that Fishman's claims that the church had ordered him to kill Dr. Geertz and commit suicide were false since Fishman had previously tried to frame the church with similar charges by staging a phony death threat 18 months earlier. While this does raise questions about whether Fishman's account was reliable, the evidence in the record shows that Behar had considerable corroboration of Fishman's account, including the testimony of Dr. Geertz that he had reported the death threat referred to in the Article to the FBI, and Dr. Geertz's testimony in Fishman's

criminal trial. In addition, Behar had reason to discount the relevance of the earlier threat based on his interview with Nurik, who told him that he believed Fishman had been manipulated into staging the fake death threat by Scientologists; Dr. Geertz's appraisal of the two threats; and Behar's own awareness of similarly convoluted plots to frame others. In any event, the Article does not present Fishman's claim as undisputed fact, but rather makes clear that Scientology denies the truth of Fishman and Dr. Geertz's charges. In view of the extensive research Behar conducted, and the fact that the death threat was accurately reported as an allegation, we agree with the district court that no reasonable jury could find that Behar had published the statements about the stock scam or the murder-suicide allegation with purposeful avoidance of the truth.

The Lottick Statements. The district court found that statements 8, 9, and 10 (concerning the Lotticks and the loss of their son Noah) could not be found to have been published with actual malice because the Lotticks were not obviously lacking in credibility, their statements were not inherently improbable, and Behar had investigated the case thoroughly. *See id.* at 643. We agree with the district court that CSI's complaints that Behar included some information and not other information, for example, by not interviewing Noah Lottick's roommate, amount to no more than "minor omissions in investigation, from which no inference of purposeful avoidance of the truth could reasonably be drawn," *id.* Any such omissions are insignificant when viewed against the backdrop of Behar's investigation as a whole: he interviewed Noah Lottick's

parents, his friends and teachers, reviewed the police report of his death, and was twice refused an interview by the director of the Dianetics Center in Hackensack, New Jersey, that Noah was attending.

The VSE Statements: Subsidiary Meaning. The district court ultimately dismissed the VSE Statement based on the subsidiary meaning doctrine established by this court in *Herbert* v. *Lando*, 781 F.2d 298 (2d Cir.1986). *See Time III*, 932 F. Supp. at 595. In *Herbert*, we held that when a "published view" of a plaintiff is not actionable as libel, other statements made in the same publication are not "actionable if they merely imply the same view, and are simply an outgrowth of and subsidiary to those claims upon which it has been held that there can be no recovery." *Id.* at 312. Relying on the Supreme Court's holding in *Masson* v. *New Yorker Magazine, Inc.*, 501 U.S. 496, 111 S.Ct. 2419, 115 L.Ed.2d 447 (1991), that the related "incremental harm" doctrine is not a creature of federal constitutional law, CSI argues that (1) the subsidiary meaning doctrine can be applied here only if it is part of the relevant body of state law, and (2) neither California nor New York law, one of which presumably applies to this case, recognizes this doctrine. Because the subsidiary meaning doctrine is merely a gloss on constitutional actual malice, we disagree.

The incremental harm doctrine at issue in *Masson* reasons that when unchallenged or non-actionable parts of a publication are damaging, an additional statement, even if maliciously false, might be non-actionable because it causes no appreciable additional harm. *See Herbert*, 781 F.2d at 310; *Simmons Ford, Inc.* v. *Consumers Union*, 516 F. Supp. 742, 750 (S.D.N.Y.

1981) (holding that, in the context of an article evaluating plaintiffs' new electrical car and rating it "Not Acceptable" for a range of unchallenged reasons, a portion of the article wrongly implying that the car did not meet federal safety standards "could not harm [plaintiffs'] reputations in any way beyond the harm already caused by the remainder of the article."). In *Masson*, the Supreme Court

> reject[ed] any suggestion that the incremental harm doctrine is compelled as a matter of First Amendment protection for speech ... [because t]he question of incremental harm does not bear upon whether a defendant has published a statement with knowledge of falsity or reckless disregard of whether it was false or not.

Masson, 501 U.S. at 523, 111 S.Ct. 2419.

By contrast with the incremental harm doctrine, the subsidiary meaning doctrine *does* "bear upon" whether a defendant has acted with actual malice. In *Herbert*, for example, this court held that nine of eleven allegedly libelous statements were not actionable because they were not maliciously published; the published statements were backed by evidence that was not known to be false, and as to the reliability of which the defendants had not shown reckless disregard. See Herbert, 781 F.2d at 305-07. Because the defendants' overall "view" of the plaintiff rested on such evidence, we held that they "could not be said to have had actual malice in publishing [it]." Id. at 311. In light of this conclusion, it would have been illogical to hold, based on other statements, that the plaintiffs in

fact had such actual malice. See id. (holding that recovery was barred as to an "incorrect" statement in part because "given the amount of other evidence supporting this view, the [defendants] did not publish this view with actual malice"); id. at 312 (holding that recovery was barred as to another statement because "[w]e have already held ... that the [defendants] did not have actual malice in publishing their view"). To avoid that contradiction, we enunciated the subsidiary meaning doctrine. It follows that the doctrine, as articulated in Herbert and as relevant here, "bear[s] ... upon" whether a "view" was published with actual malice. It is thus a question of federal constitutional law, not state law, and it remains good law after Masson.[2/]

Our holding in *Herbert* is still the law of this Circuit, and we therefore conclude that the district court properly held that the VSE Statement was subsidiary in meaning to the larger thrust of the Article, which asserted that "Scientology, rather than being a bona fide religion, is in fact organized for the purpose of making money by means legitimate and illegitimate." *Time III*, 932 F. Supp. at 595. We believe that the

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[2/] We also note that both the incremental harm and subsidiary meaning doctrines are distinct from the "libel-proof-plaintiff" doctrine. *See, e.g.*, *Cardillo* v. *Doubleday & Co.*, 518 F.2d 638, 639 (2d Cir. 1975) (dismissing action by convicted figure in organized crime who sued publisher for book that mentioned his involvement in criminal enterprises; holding that plaintiff was "libel-proof": "so unlikely by virtue of his life as a habitual criminal to be able to recover anything other than nominal damages."). Because that doctrine is not before us, we take no position on its continued vitality after *Masson*.

import of statements 6 and 7, which were included in the Article's VSE sidebar, is also subsidiary to the general message of the Article, and therefore CSI's claims with respect to those statements were properly dismissed.

We have considered CSI's remaining arguments and find them to be without merit.[3/]

CONCLUSION

We find that the challenged statements in the Article were not published with actual malice or were subsidiary in meaning to statements made without actual malice. The judgments of the district court are affirmed, and the complaint is dismissed.

[3/] Among those other claims was CSI's claim for nominal damages. CSI's status as a public figure means that it was required to demonstrate actual malice, whatever remedy it sought.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

No. 92 Civ. 3024 (PKL)

CHURCH OF SCIENTOLOGY INTERNATIONAL

Plaintiff,

v.

TIME WARNER, INC., TIME INC. MAGAZINE COMPANY, and RICHARD BEHAR,

Defendants.

OPINION AND ORDER

LEISURE, *District Judge*,

Defendants Time Warner Inc., Time Inc. Magazine Co., and Richard Behar (collectively "Time") move this court of ran Order pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure dismissing this action for failure to state a claim upon which relief can be granted. For the following reasons, the motion is denied.

BACKGROUND

Plaintiff Church of Scientology International ("CSI") brought this action to recover for damages allegedly suffered from the publication of false and defamatory statements concerning CSI in the cover story of the May 6, 1991 issue of Time magazine (the "Article"). The complaint alleges that six passages or sets of statements libeled CSI. The defendants challenge the sufficiency of the complaint, arguing that CSI has failed adequately to assert that the allegedly libelous statements are of and concerning CSI. Time additionally argues that plaintiff's allegations fail to state a valid claim not barred by the group libel doctrine. Further, Time contends that CSI can not demonstrate the individualized and distinct damages necessary to justify relief from the group libel doctrine.[4/]

For the purposes of this motion to dismiss, the allegations in the complaint are assumed to be true. *See Easton* v. *Sundram*, 947 F.2d 1011, 1014-15 (2d Cir.1991), *cert. denied*, 504 U.S. 911, 112 S.Ct. 1943, 118 L.Ed.2d 548 (1992); *Allen* v. *Westpoint-Pepperell, Inc.*, 945 F.2d 40, 44 (2d Cir.1991).

CSI alleges that the Article, entitled "Scientology: the Cult of Greed," is based on the thesis "that the Scientology religion is not an 'acceptable' religion for the social mainstream" and contains "unwarranted and bigoted attacks on the Scientology

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[4/] The defendants also suggest that the action could be dismissed under the doctrine of the libel-proof plaintiff. Recognizing that this issue would be difficult to resolve at this early stage of the litigation, however, Time elected not to press this argument at this time.

religion." *See* Complaint, ¶¶ 3, 22. The Complaint challenges six passages as false and defamatory. *See* Complaint, ¶¶ 40, 45, 52, 58, 62, 67. None of the six passages mentions *1159 CSI; in fact, CSI is mentioned only once in the eight page article, in the caption of a photograph depicting CSI's Los Angeles Headquarters. *See* Defendants' Memorandum of Law in Support of Their Motion to Dismiss the Complaint ("Time Memo."), Ex. 1, at 56. Nevertheless, CSI claims that the allegedly defamatory statements are of and concerning CSI because

> the reading audience, and those that heard of the statements and meanings, including those members of the general public who knew the plaintiff, regarded any reference to Scientology or the activities or statements of any Scientology Church, Mission or Scientologist as referring to the plaintiff which, as the Mother Church, was regarded as responsible for or the cause of such activities and statements and, in particular, for the specific activities and statements charged in the article.

Complaint, ¶ 29. In addition to this generalized allegation concerning its connection to the Article, plaintiff also asserts that the six statements are of and concerning CSI on separate, particularized grounds. *See* Complaint, ¶¶ 41, 46, 53, 59, 63, 68.

The Church of Scientology has a hierarchical structure consisting of numerous entities. As noted by the Court of

Claims in *Church of Spiritual Technology* v. *United States*, 26 Cl. Ct. 713 (1992),[2] CSI is one of three "management churches" and is the Mother Church of the Scientology religion. *Id.*, 26 Cl. Ct. 713, at 717; *see also* Complaint, ¶ 6. That court identified nearly 200 organizations that collectively constitute the Church of Scientology. *Id.*, 26 Cl. Ct. 713, at 717, n. 9. CSI claims to be the top figure in Scientology's hierarchical structure and thus maintains that the activities of all Scientology entities are ascribed to CSI.

DISCUSSION

A. Standard Governing Dismissal under Rule 12(b)(6)

The Court now turns to consider the sufficiency of the complaint under Fed.R.Civ.P. 12(b)(6). "The court's function on a Rule 12(b)(6) motion is not to weigh the evidence that might be presented at a trial but merely to determine whether the complaint itself is legally sufficient." *Festa* v. *Local 3, Int'l Bhd. of Electrical Workers*, 905 F.2d 35, 37 (2d Cir.1990); *see also Ryder Energy Distrib. Corp.* v. *Merrill Lynch Commodities, Inc.*, 748 F.2d 774, 779 (2d Cir.1984) ("The function of a motion to dismiss 'is merely to assess the legal feasibility of the complaint, not to assay the weight of the evidence which might be offered in support thereof.'" (quoting *Geisler* v. *Petrocelli*, 616 F.2d 636, 639 (2d Cir.1980))).

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[2] The Court properly may take judicial notice of reported decisions dealing with various Scientology organizations. *See, e.g., E.I. Du Pont de Nemours Co.* v. *Cullen*, 791 F.2d 5, 7 (1st Cir.1986); *United States* v. *Estep*, 760 F.2d 1060, 1063 (10th Cir.1985).

A motion to dismiss must be denied "unless it appears beyond a doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Scheuer* v. *Rhodes*, 416 U.S. 232, 236, 94 S.Ct. 1683, 1686, 40 L.Ed.2d 90 (1974) (citing *Conley* v. *Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 101-102, 2 L.Ed.2d 80 (1957)); *see also Oliver Schools, Inc.* v. *Foley*, 930 F.2d 248, 252 (2d Cir.1991). Although the Court must limit its analysis to the four corners of the complaint, it also may consider documents incorporated into the complaint by reference and information that can be judicially noticed. *Allen*, 945 F.2d at 44. Thus, in this case, the Court may consider the Article in assessing the sufficiency of the Complaint. In addition, the Court must draw all reasonable inferences in plaintiff's favor. *Papasan* v. *Allain*, 478 U.S. 265, 283, 106 S.Ct. 2932, 2943, 92 L.Ed.2d 209 (1986); *Allen*, 945 F.2d at 44; *Murray* v. *Milford*, 380 F.2d 468, 470 (2d Cir.1967); *Hill* v. *Sullivan*, 125 F.R.D. 86, 90 (S.D.N.Y.1989) ("[A]ll allegations in plaintiffs' amended complaint must be accepted as true and liberally construed.").

B. The "Of and Concerning" Requirement

To withstand a motion to dismiss, the libel plaintiff must "advance [ ] colorable claims of having been identified and described by defamatory comment." *Geisler* v. *Petrocelli*, 616 F.2d 636, 640 (2d Cir. 1980); *accord Bee Pub., Inc.* v. *Cheektowaga Times, Inc.*, 107 A.D.2d 382, 385, 485 N.Y.S.2d 885, 888 (4th Dep't 1985); *cf. Springer* v. *Viking Press*, 60 N.Y.2d 916, 917, 470 N.Y.S.2d 579, 580, 458 N.E.2d 1256, 1257 (1983) ("of and concerning" requirement is an essential element of a libel claim). Although the "of and concerning"

requirement is generally an issue of fact, which the jury alone may decide, the Court properly may dismiss an action pursuant to Rule 12(b)(6) where the statements "are incapable of supporting a jury's finding that the allegedly libelous statements refer to plaintiff." *Handelman* v. *Hustler Magazine, Inc.*, 469 F. Supp. 1048, 1050 (S.D.N.Y. 1978). Whether the complaint alleges facts sufficient to demonstrate a reasonable connection between the plaintiff and the alleged libel is thus a question for the Court. *See Mullenmeister* v. *Snap-On Tools Corp.*, 587 F. Supp. 868, 872 (S.D.N.Y. 1984). In determining whether the "of and concerning" requirement has been sufficiently pleaded, the Court must consider whether those who know the plaintiff, upon reading the statements, would understand that the plaintiff was the target of the allegedly libelous statement. *See Dalbec* v. *Gentleman's Companion, Inc.*, 828 F.2d 921, 925 (2d Cir. 1987) ("It is not necessary that all the world should understand the libel.").

Under the group libel doctrine, a plaintiff's claim is insufficient if the allegedly defamatory statement referenced the plaintiff solely as a member of a group. *See, e.g., New York Times Co.* v. *Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964); *Provisional Government of the Republic of New Afrika* v. *American Broadcasting Companies*, 609 F. Supp. 104, 108 (D.D.C. 1985) ("a defamatory statement directed against a group or class does not generally give rise to a cause of action on behalf of its individual members"); *Church of Scientology* v. *Flynn*, 578 F. Supp. 266, 269 (D. Mass. 1984); *Talal* v. *Fanning*, 506 F. Supp. 186, 187 (N.D. Cal. 1980) (dismissing libel claim pursuant to group libel doctrine). Thus, if a plaintiff

is libeled as a member of a large group, the "of and concerning" requirement is not properly pleaded. Court have often had occasion to note that the public interest in ensuring open and vigorous debate occasionally results in some injury to an individual as the result of a libel of his profession, political party, or sect. If such damages were actionable, free expression would be impaired by the threat of liability. *See, e.g., New York Times Co.* v. *Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686; *Ryckman* v. *Delavan*, 25 Wend. 186, 199 (N.Y. 1840); *People* v. *Edmondson*, 168 Misc. 142, 146, 4 N.Y.S.2d 257, 260-62 (Gen. Sess. N.Y. Co. 1938). In order to overcome the group libel doctrine, the plaintiff must demonstrate that "the circumstances of the publication reasonably give rise to the conclusion that there is a particular reference to the member." Restatement (Second) of Torts, § 564A(b).

In determining whether CSI has satisfactorily pleaded the "of and concerning" requirement, the Court must determine whether the allegedly libelous statements directly or impliedly referred to CSI. Additionally, the Court must decide whether any reference to CSI in the Article arose solely from its status as one of the numerous entities that constitute the Church of Scientology, thus implicating the group libel doctrine and, if these statements involved group libel, whether CSI was referred to in any particular way so as to escape the constraints of the group libel doctrine.

The Court must emphasize the procedural setting of this case. The Court is called upon to determine whether CSI's complaint is sufficient to survive a motion to dismiss, not whether Time is liable to CSI for defamation. Moreover, this

motion is directed exclusively at one of the essential elements of a libel claim: the "of and concerning" requirement. While other defenses may shield Time from liability, those issues are not presently before the Court and thus may not be considered.

C. The Allegedly Libelous Statements

Prior to individual consideration of each of the allegedly libelous statements, the Court must note certain statements in the Article that are not included in the complaint as alleged libels. Consideration of these references may explain CSI's connection to the statements and thus may inform the determination of whether the six statements sued upon reference CSI.

CSI is mentioned in name only once during the article: CSI is pictured in one of six photographs on page 56 of the Article and the photograph is captioned "Church of Scientology International headquarters, Los Angeles." While this photograph, standing alone, is insufficient to create a jury question as to whether a portion of the reading public would regard the allegedly defamatory statements as referring to CSI, the "of and concerning" requirement could be satisfied when the photograph and caption are considered in conjunction with other statements in the Article.

The Article also contains repeated references to "Scientology," the "Church of Scientology," the "church," and the "Los Angeles-based church." *See*, Time Memo., Ex. 1, *passim*. CSI's suggestion that any reference to Scientology is necessarily a reference to CSI encounters the bar of the group libel rule. CSI is one of hundreds of Scientology entities

implicated by a reference to "Scientology." Because CSI has failed to demonstrate that the references in the Article to "Scientology" particularly refer to CSI, as differentiated from the hundreds of other Scientology entities, the Article's references to "Scientology" do not support a finding that CSI has sufficiently pleaded the "of and concerning" requirement. *See* Restatement (Second) of Torts § 564A(b).

The Court finds, however, that the Article's discussion of the "Church of Scientology" and the "church" could support a finding that some of the six allegedly defamatory statements are reasonably connected to CSI, given the hierarchical structure of the Church of Scientology. *See Church of Scientology of California* v. *Flynn*, 744 F.2d 694, 697 (9th Cir. 1984). Moreover, the reference to the "Los Angeles-based church" could be considered a direct reference to CSI. Although there are other Scientology churches in California, it appears that the limited number of such churches is insufficient to compel application of the group libel rule. Considering CSI's capacity as "Mother Church," the hierarchical structure of Scientology, and the caption of the photograph identifying CSI's headquarters as being located in Los Angeles, the Court finds that these statements could support a finding that CSI sufficiently has pleaded a reasonable connection to the statements sued upon.

Plaintiffs also allege that the reading public would understand that any reference to the activities or statements of any Scientologist would be understood to refer to CSI. *See* Complaint, ¶ 29. This legal proposition is erroneous and must be rejected as a matter of law. *See Provisional Government of*

the Republic of New Afrika, 609 F. Supp. at 108 ("Allegations of defamation by an organization and its members are not interchangeable. Statements which refer to individual members of an organization do not implicate the organization.") Without more, reference to the activities of individual Scientologists can not create a right of action in CSI. Plaintiff's suggestion would result in a constriction of the scope of permissible speech, as every reference to a person's religion would expose the speaker to liability, or at least extended litigation, concerning an alleged libel of the subject's "mother church." Further, plaintiff's proposition can not overcome the prohibition of the group libel doctrine, as it has failed to demonstrate a particular reference to CSI. Thus, the Court has determined that references to the activities or statements of individual Scientologists or groups of Scientologists are not of and concerning CSI.

Sufficiently informed by statements in the Article that are not the subject of CSI's complaint and certain facts which may be judicially noticed, the Court now turns to consider individually the six allegedly libelous statements.

1. Paragraph 40

Paragraph 40 of the complaint alleges that the following statements in the Article libeled CSI:

> "[T]he church ... survives by intimidating members and critics in a Mafia-like manner."
>
> ....
>
> " 'Scientology is quite likely the most ruthless, the most classically terroristic ... cult the

> country has ever seen.'"
>
> ....
>
> "Those who criticize the church – journalists, doctors, lawyers and even judges – often find themselves framed for fictional crimes, beaten up or threatened with death."

Complaint, ¶ 40.[9] A jury reasonably could find that the statements discussing "church" activities referred specifically to CSI, as Mother Church and one of Scientology's three management churches. Thus, the group libel bar is inapplicable to this statement, as the jury could find that the statement refers to a specific actor and not Scientology as a whole. *See Flynn*, 744 F.2d at 697.

Having avoided the principle of group libel, CSI still must demonstrate that the statement is of and concerning CSI. Defendant has pleaded that

> The aforesaid statements were understood by the public who read or was informed of them to have the following false and defamatory meanings:
>
> A. Plaintiff is guilty of violence and threats of violence similar to the Mafia.

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[9] Where quotations of the *Time* article in the complaint differ from the original text, the Court will quote the statements as they appeared in the Article.

B. Plaintiff heads the most ruthless and terroristic cult in this country's history.

C. Plaintiff frames its critics, beats them up and threatens them with death.

Complaint, ¶ 41. Additionally, the Court must consider that those who were familiar with the plaintiff might know that it is the Mother Church of Scientology and one of three management churches. While the reference in this set of statements is to the "church," clearly Time can not avoid a finding that the statements are of and concerning CSI merely by using the term "church" instead of "Church." Under the circumstances of this case, a jury reasonably could find that the term "church," as used in these statements, specifically referred to CSI. The Court finds that CSI sufficiently has pleaded the "of and concerning" requirement with respect to paragraph 40 of the complaint.

2. Paragraph 45

Paragraph 45 of the complaint alleges that the following passage in the Article libeled CSI:

> "Occasionally a Scientologist's business antics land him in jail. Last August a former devotee named Steven Fishman began serving a five-year prison term in Florida. His crime: stealing blank stock-confirmation slips from his employer, a major brokerage house, to use as proof that he owned stock entitling him to join dozens of successful class-action suits. Fishman

> made roughly $1 million this way from 1983 to 1988 and spent as much as 30% of the loot on Scientology books and tapes.
>
> "Scientology denies any tie to the Fishman scam, a claim strongly disputed by both Fishman and his longtime psychiatrist, Uwe Geertz, a prominent Florida hypnotist. Both men claim that when arrested, Fishman was ordered by the church to kill Geertz and then do an 'EOC,' or end of cycle, which is church jargon for suicide."

Complaint, ¶ 45. Much of this passage is not of and concerning the plaintiff. As discussed supra, CSI has failed to demonstrate a reasonable connection to the activities of individual Scientologists such that these statements can be said to be of and concerning CSI. CSI alleges that the reading public understood this passage to mean that CSI was engaged in ordering people to commit murder and suicide. Complaint, ¶ 46. The general reference to "the church" could reasonably be interpreted to mean CSI, as CSI sits at the top of the hierarchical structure that constitutes the Church of Scientology. Thus, CSI has successfully pleaded the "of and concerning" requirement with respect to paragraph 45 of the complaint.

3. Paragraph 52

Paragraph 52 of the complaint alleges that the following statements in the Article libeled CSI:

> "One source of funds for the Los Angeles-based church is the notorious, self- regulated stock exchange in Vancouver, British Columbia, often called the scam capital of the world."
>
> ....
>
> "Bayback, 49, who runs a public relations company staffed with Scientologists, apparently has no ethics problem with engineering a hostile takeover of a firm he is hired to promote."
>
> ....
>
> " 'What these guys do is take over companies, hype the stock, sell their shares, and then there's nothing left.'"
>
> ....
>
> " 'They stole this man's property'"

Complaint, ¶ 52. As the Court has noted, supra, the references to the activities of individual Scientologists, standing alone, fail to satisfy the "of and concerning" requirement. The Court is doubtful as to whether this set of statements is truly of and concerning CSI. Plaintiff claims that it has demonstrated a sufficient connection to these statements to withstand a motion to dismiss. Plaintiff alleges:

> The aforesaid statements were understood by the public who read or were informed of them to have the false and defamatory meanings that plaintiff obtains funds by participating in scams

> on the Vancouver Stock Exchange ("VSE") and that plaintiff's VSE activities include use of Scientologists who are unethical, who strip companies of their value and who steal the property of entrepreneurs.
>
> ....
>
> The aforesaid false and defamatory statements were understood to be of and concerning plaintiff since plaintiff is based in Los Angeles, the activities referred to were understood to be for the purpose of supplying a source of funds to plaintiff and it was understood that plaintiff was responsible for the activities of Scientologists involved in creating a source of funds for it.

Complaint, ¶¶ 53, 57. Clearly, the reference to the "Los Angeles-based church" could reasonably be understood to refer to CSI, as CSI is based in Los Angeles and is at the top of the hierarchal structure of the Church of Scientology. Conversely, statements concerning the activities of individual Scientologists are not of and concerning CSI. While the connection to CSI in the above-quoted passage from the Article is weak, the Court has determined that, under the particular facts of this case, CSI sufficiently has pleaded the "of and concerning" requirement as to this statement. Thus, this allegation can withstand Time's motion to dismiss.

4. Paragraph 58

Paragraph 58 of the complaint alleges that the following

statements in the Article libeled CSI:

> "THE LOTTICKS LOST THEIR SON, Noah, who jumped from a Manhattan hotel clutching $171, virtually the only money he had not yet turned over to Scientology. His parents blame the church and would like to sue but are frightened by the organization's reputation for ruthlessness."
>
> ....
>
> "His death inspired his father Edward, a physician, to start his own investigation of the church. 'We thought Scientology was something like Dale Carnegie,' Lottick says. 'I now believe it's a school for psychopaths. Their so-called therapies are manipulations. They take the best and brightest people and destroy them.'"
>
> ....
>
> "It was too late. 'From Noah's friends at Dianetics' read the card that accompanied a bouquet of flowers at Lottick's funeral. Yet no Scientology staff members bothered to show up."

Complaint, ¶ 58. The discussion of certain activities undertaken by "the church" and the Lotticks' fears of "the organization" provide a connection to CSI sufficient to satisfy the "of and concerning" requirement. CSI alleged in the complaint that

> The aforesaid statements were understood by the public who read or was informed of them to have the false and defamatory meanings that the plaintiff was responsible for Noah Lottick's death, that plaintiff had bankrupted him causing him to commit suicide, that because Noah Lottick's parents were frightened by the Church, they have not sued it, and that Church staff members were unfeeling and unsupportive, interested only in Noah Lottick while he was alive.

Complaint, ¶ 59. As discussed supra, CSI's position in the structure of the Church of Scientology is such that a reader familiar with CSI could reasonably conclude that the passage referred to CSI. Thus, paragraph 58 of the complaint satisfies the "of and concerning" requirement.

5. Paragraph 62

Paragraph 62 of the complaint alleges that the following passage in the Article libeled CSI:

> "The next month the Rowes flew to Glendale, Calif., where they shuttled daily from a local hotel to a Dianetics center. 'We thought they were brilliant people because they seemed to know so much about us,' recalls Dee. 'Then we realized our hotel room must have been bugged.' After bolting from the center, $23,000 poorer, the Rowes say, they were chased repeatedly by Scientologists on foot and in

cars."

Complaint, ¶ 62. The Court finds that CSI has failed to demonstrate a reasonable connection to this statement. Permitting CSI to prosecute a libel claim on every occasion where any Scientology entity is discussed in a negative light would be too great an imposition on society's interest in ensuring an open forum for vigorous public debate. The above passage, whether read alone or in conjunction with the rest of the article, and informed by knowledge of the hierarchical structure of Scientology, could not support a jury finding that the statement refers to CSI. *See Provisional Government of the Republic of New Afrika*, 609 F. Supp. at 108; *Handelman*, 469 F. Supp. at 1050. Thus, paragraph 62 does not allege a statement that could reasonably considered to be of and concerning CSI.

6. Paragraph 67

Paragraph 67 of the complaint alleges that the following statement in the Article libeled CSI:

> "In a court filing, one of the cult's many entities – the Church of Spiritual Technology – listed $503 million in income just for 1987."

Complaint, ¶ 67. The Court can discern no reference to CSI in this passage. Rather, the passage specifically identifies another Scientology entity, as distinguished from CSI. The Court explicitly rejects the suggestion that the statement must refer to CSI because all references to all Scientology entities are necessarily of and concerning CSI. CSI has failed to allege a

reasonable connection between itself and the alleged libel. *See Mullenmeister*, 587 F. Supp. at 872. Thus, paragraph 67 fails to allege a statement of and concerning CSI.

Thus, the Court has determined that the allegations in paragraphs 40, 45, 52, and 58 are sufficiently pleaded to withstand the instant motion to dismiss the complaint for failure to state a cause of action upon which relief can be granted.

CONCLUSION

For all the foregoing reasons, the motion of defendants Time Warner, Inc., Time Inc. Magazine Co., and Richard Behar for dismissal of the complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure hereby is denied.

SO ORDERED

Dated: November 23, 1992
New York, New York

/s/ PETER K. LEISURE
Peter K. Leisure

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

No. 92 Civ. 3024 (PKL)

CHURCH OF SCIENTOLOGY INTERNATIONAL

Plaintiff,

v.

TIME WARNER, INC., TIME INC. MAGAZINE COMPANY, and RICHARD BEHAR,

Defendants.

OPINION AND ORDER

LEISURE, *District Judge*:

Plaintiff Church of Scientology International ("CSI") brought this action to recover for damages allegedly suffered from the publication of false and defamatory statements concerning CSI in the cover story of the May 6, 1991 issue of Time magazine. Defendants Time Warner, Inc., Time Inc. Magazine Company, and Richard Behar (collectively "Time")

move this Court for summary judgment, pursuant to Federal Rule of Civil Procedure 56, on the grounds that they lacked actual malice in publishing the article about CSI, an admitted public figure. *See* Plaintiff's Response to Defendants' First Set of Requests for Admission to Plaintiff. For the reasons stated below, defendants' motion is granted in part and denied in part.

DISCUSSION

"Summary judgment is proper only if, viewing all evidence in the light most favorable to the nonmoving party, there is no genuine issue of material fact" as to an essential element of a claim. *Buttry* v. *General Signal Corp.*, 68 F.3d 1488, 1492 (2d Cir. 1995). A public figure suing for libel must prove, as one of the essential elements of the claim, that the defendant published the material with actual malice, *i.e.*, actual knowledge of its falsity or with serious subjective doubts as to its truth. *See New York Times Co.* v. *Sullivan*, 376 U.S. 254, 279-80, 84 S.Ct. 710, 725-26, 11 L.Ed.2d 686 (1964); *St. Amant* v. *Thompson*, 390 U.S. 727, 731-32, 88 S.Ct. 1323, 1325-26, 20 L.Ed.2d 262 (1968). The First Amendment further requires that the plaintiff prove actual malice with clear and convincing evidence. *See id.* Therefore, "there is no genuine issue if the evidence presented in the opposing affidavits is of insufficient caliber or quantity to allow a rational finder of fact to find actual malice by clear and convincing evidence." *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 254, 106 S.Ct. 2505, 2513, 91 L.Ed.2d 202 (1986).

Although a defendant's state of mind is at issue in a libel case covered by *New York Times*, that fact alone cannot preclude summary judgment, for First Amendment protection

cannot be emasculated by unwillingness on the part of a court to grant summary judgment where "affirmative evidence of the defendant's state of mind" is lacking. A libel suit cannot be allowed to get to the jury, at enormous expense to the defendant, based on mere assertions of malice by the plaintiff. *Cf. St. Surin* v. *Virgin Islands Daily News, Inc.*, 21 F.3d 1309, 1318 (3d Cir. 1994) ("Summary judgment for the publisher is quite often appropriate because of the difficulty a public official has in showing 'actual malice.'"). Indeed, without judicious use of summary judgment to dispose of libel suits, "the threat of being put to the defense of a lawsuit ... may be as chilling to the exercise of First Amendment freedoms as fear of the outcome of the lawsuit itself." *Immuno AG.* v. *Moor-Jankowski*, 74 N.Y.2d 548, 561, 549 N.E.2d 129, 135, 549 N.Y.S.2d 938, 944 (1989) (internal quotation marks omitted), *vacated*, 497 U.S. 1021, 110 S.Ct. 3266, 111 L.Ed.2d 776 (1990), *adhered to*, 77 N.Y.2d 235, 567 N.E.2d 1270, 566 N.Y.S.2d 906 (1991), *cert. denied*, 500 U.S. 954, 111 S.Ct. 2261, 114 L.Ed.2d 713 (1991). Because the freedoms guaranteed by the First Amendment are designed to ensure that debate, not litigation, is vigorous, the subjective nature of the test of liability cannot create a bar to summary disposition of libel suits.[1/] *See McLee*

[1/] In this respect, the Court notes that both debate and litigation have been vigorous in the case at bar. CSI published an 80-page rebuttal to the *Time* article, which it distributed to church members, business leaders, and political figures. *See* Memorandum of Law in Support of Defendants' Motion for Summary Judgment ("Def.'s Memo.") at 3. In addition, CSI published a series of full-page advertisements in *USA Today* challenging the article and Time's accuracy and biases in publishing it. *See id.*; Affidavit of

v. *Chrysler Corp.*, 38 F.3d 67, 68 (2d Cir.1994) (ruling that district court's view – that summary judgment was unavailable in discrimination cases where employer's intent was at issue – was unsupportable). Indeed, this Court finds little to distinguish silence enforced by oppressive litigation from "silence coerced by law – the argument of force in its worst form." *Whitney* v. *California*, 274 U.S. 357, 375-76, 47 S.Ct. 641, 648-49, 71 L.Ed. 1095 (1927) (Brandeis, J., concurring).

In addition, the Court must "consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks." *New York Times Co.*, 376 U.S. at 270, 84 S.Ct. at 720. As quoted in *New York Times*,

> "In the realm of religious faith, and in that of political belief, sharp differences arise. In both fields the tenets of one man may seem the rankest error to his neighbor. To persuade others to his own point of view, the pleader, as we know, at times, resorts to exaggeration, to vilification of men who have been, or are,

---

Lynn R. Farny ("Farny Aff.") ¶ 16, Exs. 14, 15. The discovery in this case has been extensive, even though discovery has not yet been directed to the issue of truth or falsity. For example, Richard Behar, the author of the article, was deposed for 16 1/2 days over a 12 month period. *See* Def.'s Memo. at 4. The submissions to the Court in support of or in opposition to this motion consist of thousands of pages of memoranda, affidavits, and exhibits.

> prominent in church or state, and even to false statement. But the people of this nation have ordained in the light of history, that, in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy."

Id. at 271, 84 S.Ct. at 721 (quoting *Cantwell* v. *Connecticut*, 310 U.S. 296, 310, 60 S.Ct. 900, 906, 84 L.Ed. 1213 (1940)). Because sharp disagreement is essential to robust debate about important issues, "[a]ctual malice under the New York Times standard should not be confused with the concept of malice as an evil intent or a motive arising from spite or ill will." *Masson* v. *New Yorker Magazine, Inc.*, 501 U.S. 496, 510, 111 S.Ct. 2419, 2429, 115 L.Ed.2d 447 (1991). The speaker's belief in his statements, even his exaggerations, enhances, rather than diminishes, the likelihood that they are protected from libel attack by the First Amendment. Only where the speaker himself lacks this conviction, where the speaker entertains serious doubt as to the veracity of his statements, is the false statement actionable. *See St. Amant*, 390 U.S. at 731, 88 S.Ct. at 1325.

As a threshold matter, then, the Court considers plaintiff's assertions that Behar, after publishing an article in Forbes critical of the church,

> targeted the Church with a fixed view of it as a 'destructive cult.' In the next five years, through the publication of his article in the May 6, 1991 issue of *Time*, Behar refined his focus –

> gathering negative information from Scientology adversaries and proposing anti-Church articles – while never changing any view about the Church, never accepting anything a Scientologist said and uniformly ignoring anything positive he learned about the Church.

Plaintiff's Memorandum of Law in Opposition to Defendants' Motion for Summary Judgment at 2. As noted, malice in the sense of hatred or ill-will is often indicative of lack of the actual malice required under *New York Times*, and therefore would tend to undermine, not support, plaintiff's case. In addition, "reckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing." *St. Amant*, 390 U.S. at 731, 88 S.Ct. at 1325. However, the combination of inadequate investigation with bias on the part of the publisher can give rise to an inference of actual malice. *See Harte-Hanks Communications, Inc.* v. *Connaughton*, 491 U.S. 657, 682, 109 S.Ct. 2678, 2693, 105 L.Ed.2d 562 (1989). With a showing of an extreme departure from standard investigative techniques, bias of the reporter becomes relevant to explain this extreme departure as more than mere carelessness – rather as purposeful avoidance of the truth. Plaintiff therefore devotes much of its opposition to the motion to attempting to demonstrate Behar's predetermined bias toward the church. However, plaintiff has failed to demonstrate the correlative circumstance of inadequate investigation to make its evidence of bias probative of actual malice, rather than probative of lack thereof. Without a

showing of inadequate investigation, bias merely confirms the publisher's firmly-held belief in the allegedly defamatory statements.

With these principles in mind, the Court considers each allegedly libelous statement individually to determine whether a rational finder of fact could find actual malice by clear and convincing evidence. *See Tavoulareas* v. *Piro*, 817 F.2d 762, 794 (D.C.Cir.) (*en banc*) ("[D]efamation plaintiffs cannot show actual malice in the abstract; they must demonstrate actual malice *in conjunction* with a false defamatory statement." (emphasis in original)), *cert. denied*, 484 U.S. 870, 108 S.Ct. 200, 98 L.Ed.2d 151 (1987).

A. Statements Set Forth at ¶ 40

Paragraph 40 of the complaint sets forth several statements alleged to be false and defamatory. (The text of the sentences as they appear in the article is set forth below; the portions quoted in the complaint are underlined.)

> 1. "In reality *the church* is a hugely profitable global racket that *survives by intimidating members and critics in a Mafia-like manner*."
>
> 2. "Says Cynthia Kisser, the [Cult Awareness] network's Chicago-based executive director: '*Scientology is quite likely the most ruthless, the most classically terroristic*, the most litigious and the most lucrative *cult the country has ever seen*. No cult extracts more money from its members.'"

> 3. *"Those who criticize the church–journalists, doctors, lawyers and even judges–often find themselves* engulfed in litigation, stalked by private eyes, *framed for fictional crimes, beaten up or threatened with death."*

1. Mafia-Like Intimidation

Time relied on many sources as the basis for its belief that "the church ... survives by intimidating members and critics in a Mafia-like manner." None of these sources is so obviously incredible that a reasonable jury could infer from Time's reliance on them knowledge of falsity or subjective doubt as to veracity. *See St. Amant*, 390 U.S. at 732, 88 S.Ct. at 1326; *cf. id.* ("Professions of good faith will be unlikely to prove persuasive, for example, where a story is fabricated by the defendant, is the product of his imagination, or is based wholly on an unverified anonymous telephone call."). *Compare Harte-Hanks*, 491 U.S. at 691, 109 S.Ct. at 2697 ("The hesitant, inaudible, and sometimes unresponsive and improbable tone of Thompson's answers to various leading questions raise obvious doubts about her veracity."). On the contrary, Behar relied on affidavits from former high-ranking Scientologists, newspaper and periodical articles, interviews and personal experience, and published court opinions, often issued after the benefit of adversarial presentation of testimony, which supported his professed belief that CSI intimidated critics and members. See Affidavit of Richard Behar ("Behar Aff.") ¶¶ 28-61. The Court finds that based on this evidence, no reasonable jury could find that CSI had proven by clear and convincing evidence that Time either knew or entertained serious doubts that the

statement was false.

2. Most Ruthless, Classically Terroristic Cult

This statement appeared in the article in the form of a quotation from Cynthia Kisser, executive director of the Cult Awareness Network. "Repetition of another's words does not release one of responsibility if the repeater knows that the words are false or inherently improbable, or there are obvious reasons to doubt the veracity of the person quoted or the accuracy of his reports." *Goldwater* v. *Ginzburg*, 414 F.2d 324, 337 (2d Cir.1969), *cert. denied*, 396 U.S. 1049, 90 S.Ct. 701, 24 L.Ed.2d 695 (1970). Based on the material supporting Behar's statement regarding Mafia- like intimidation, *see* Behar Aff. ¶¶ 28-61; *see also id.* ¶¶ 62-67, Behar's repetition of Kisser's statement was not done with knowledge that the statement was false or inherently improbable. Nor are there obvious reasons to doubt Kisser's veracity. There is no doubt that her views are deeply opposed to CSI's views, and each likely regards the other's conduct as reprehensible if not criminal, *see* Farny Aff. ¶ 98, but such sharp disagreement and Kisser's obvious antagonistic relationship with Scientology does not amount to an obvious reason to doubt her veracity. On the contrary, as executive director of an organization dedicated to studying so-called cults, her judgment as to CSI's ruthlessness and terroristic practices likely carried credence with Behar. *See id.* ¶ 62. The Court therefore finds that a reasonable jury could not find that plaintiff had demonstrated actual malice on the part of Time in publishing this statement by clear and convincing evidence.

3. Journalists, Doctors, Lawyers, and Judges Framed, Beaten Up, or Threatened with Death

In light of Behar's beliefs regarding his own experiences with Scientology, the admitted harassment of Paulette Cooper by Scientology's Guardian's Office (which has been disbanded), and the other sources relied on by Behar, *see* Behar Aff. ¶¶ 85-93, the Court finds no evidence that Behar made the statement regarding journalists with actual malice. Similarly, there are not "obvious reasons to doubt" Behar's sources for his statement regarding doctors, lawyers, and judges. *See St. Amant*, 390 U.S. at 732, 88 S.Ct. at 1326. Although Behar does not have convincing evidence to link CSI with many of the strange incidents befalling these groups of people in conflict with Scientology, that fact alone does not allow a reasonable jury to conclude that Behar entertained doubts as to the veracity of his statement that these incidents are linked to CSI. *Compare id.* at 732, 88 S.Ct. at 1326 (good faith unlikely where story is fabricated by defendant, based on his imagination, or based on unverified anonymous telephone call). Therefore, the Court finds that no reasonable jury could find by clear and convincing evidence that Time published the above statement with actual malice.

B. Statements Set Forth at ¶ 58

CSI challenges the following as false and defamatory:

> "THE LOTTICKS LOST THEIR SON, Noah, who jumped from a Manhattan hotel clutching $171, virtually the only money he had not yet turned over to Scientology. His parents

> blame the church and would like to sue but are frightened by the organization's reputation for ruthlessness.
>
> "His death inspired his father Edward, a physician, to start his own investigation of the church. 'We thought Scientology was something like Dale Carnegie,' Lottick says. 'I now believe it's a school for psychopaths. Their so-called therapies are manipulations. They take the best and brightest people and destroy them.'
>
> "It was too late. 'From Noah's friends at Dianetics' read the card that accompanied a bouquet of flowers at Lottick's funeral. Yet no Scientology staff members bothered to show up."

The primary sources relied on by Behar for these statements are the parents of Noah Lottick. The Lotticks affirmed the accuracy of each statement in the article. *See* Reply Memorandum of Law in Further Support of Defendants' Motion for Summary Judgment ("Def.'s Reply") at 12. Furthermore, the Lotticks are not obviously lacking in credibility, and the statements are not inherently improbable. Nevertheless, Behar made a thorough investigation of this aspect of his article by discussing it with various persons who knew Noah. Although Behar can be criticized for not interviewing Fred Lemons, an active Scientologist, asserted Scientology staff member, and former roommate of Noah Lottick, this omission is not such that it might raise an inference

of purposeful avoidance of the truth. Cf. Harte-Hanks, 491 U.S. at 682, 109 S.Ct. at 2693 ("[W]hile denials coming from Connaughton's supporters might be explained as motivated by a desire to assist Connaughton, a denial coming from [the uninterviewed] Stephens would quickly put an end to the story."). Any information to be gleaned from Lemons might be expected to be similar to, though less authoritative than, information that might be obtained from the director of the Scientology Dianetics Center, whom Behar twice attempted to contact. *See* Behar Aff. ¶ 106. In short, besides minor omissions in investigation, from which no inference of purposeful avoidance of the truth could reasonably be drawn, (even combined with Behar's alleged bias, *see supra*) CSI has not produced evidence such that a reasonable jury could find by clear and convincing evidence that Behar published the statements with actual malice. On the contrary, as reflected in Behar's notes from one of his conversations with the Lotticks, it appears that Noah had spent the money to which he had access, that Dr. Lottick had concluded that Scientology therapies were manipulations, and that no Scientology staff members attended the funeral.[2/] *See* Affidavit of Jonathan W. Lubell, Esq., at Ex. 41. Therefore, the Court finds that no reasonable jury could find by clear and convincing evidence that Time published the above statement with actual malice.

C. Statements Set Forth at ¶ 45

[2/] Although CSI asserts that Fred Lemons is a staff member, there is no evidence that Behar knew this fact. In addition, if Behar were trying to avoid this fact, he would not have contacted the Scientology center.

Of the statements set forth at paragraph 45 of the complaint, pursuant to this Court's ruling of November 23, 1992, only the following remains at issue:

> "Scientology denies any tie to the Fishman Scam, a claim strongly disputed by both Fishman and his longtime psychiatrist, Uwe Geertz, a prominent Florida hypnotist. Both men claim that when arrested, Fishman was ordered by the church to kill Geertz and then do an 'EOC,' or end of cycle, which is church jargon for suicide."

Behar relied on Steven Fishman, Uwe Geertz, Fishman's psychologist, Marc Nurik, Fishman's former counsel, Vicki Aznaran, a former Scientologist, and Robert Dondero, the assistant United States Attorney who prosecuted Fishman for stock fraud. Although Fishman in many respects is not highly credible, based on the corroboration of aspects of his claims by other sources, this Court finds that his claims are not obviously incredible. *Cf. St. Amant*, 390 U.S. at 732, 88 S.Ct. at 1326 (good faith unlikely where unverified reliance on obviously incredible source). Specifically, Behar relied on Geertz's evaluation of Fishman's claims, Vicki Aznaran's corroboration of Fishman and Geertz's claims regarding the length of Fishman's involvement with the church, the depth of knowledge of Scientology that Fishman demonstrated, and the corroboration of certain claims by Robert Dondero. The fact that Dondero did not believe Fishman's claims does not undermine Behar's belief because Dondero was at the time prosecuting Fishman, and that prosecution would be

undermined by accepting Fishman's account of Scientology's involvement with Fishman. *Cf. Harte-Hanks*, 491 U.S. at 682, 109 S.Ct. at 2693 (denials coming from interested witnesses would not cause reporter to question veracity of allegations). Therefore, the Court finds that no reasonable jury could find by clear and convincing evidence that Time published the above statement with actual malice.

D. Statements Set Forth in ¶ 52

Of the statements set forth at paragraph 52 of the complaint, pursuant to this Court's ruling of November 23, 1992, only the following remains at issue:

> "One source of funds for the Los Angeles-based church is the notorious, self-regulated stock exchange in Vancouver, British Columbia, often called the scam capital of the world."

The Court finds that a reasonable jury could find by clear and convincing evidence that Time published the above statement with actual malice.

CONCLUSION

For the reasons stated above, defendants' motion for summary judgment is HEREBY DENIED as to the statement set forth at paragraph 52 of the complaint, and HEREBY GRANTED as to all other statements.

SO ORDERED.

Dated: November 14, 1995
New York, New York

/s/ PETER K. LEISURE
Peter K. Leisure

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

No. 92 Civ. 3024 (PKL)

CHURCH OF SCIENTOLOGY INTERNATIONAL

Plaintiff,

v.

TIME WARNER, INC., TIME INC. MAGAZINE COMPANY, and RICHARD BEHAR,

Defendants.

OPINION AND ORDER

LEISURE, *District Judge*:

Defendants moved for summary judgment in this libel action, which the Court granted in part and denied in part. *See Church of Scientology Int'l* v. *Time Warner, Inc.*, 903 F. Supp. 637 (S.D.N.Y.1995). Defendants then moved for reargument and reconsideration, arguing that the Court should have granted

summary judgment in full because the sole remaining statement sued upon is nonactionable based on the incremental harm doctrine. After reargument, and upon reconsideration, for the reasons stated below, the Court grants summary judgment as to the sole remaining statement in the case and dismisses the case in its entirety.

BACKGROUND

In 1992, *Time* magazine published a 10 page, 7500 word article entitled "Scientology: The Cult of Greed" (the "Article"). The Article was highly critical of Scientology, and included such statements as:

> "For nearly 40 years, the big business of Scientology has shielded itself exquisitely behind the First Amendment...."
>
> "In reality the church is a hugely profitable global racket that survives by intimidating members and critics in a Mafia-like manner."
>
> "Many of the group's followers have been accused of committing financial scams, while the church is busy attracting the unwary through a wide array of front groups in such businesses as publishing, consulting, health care and even remedial education."
>
> "Says Cynthia Kisser, the [Cult Awareness Network's] Chicago-based executive director: 'Scientology is quite likely the most ruthless, the most classically terroristic, the most litigious

and the most lucrative cult the country has ever seen. No cult extracts more money from its members.' Agrees Vicki Aznaran, who was one of Scientology's six key leaders until she bolted from the church in 1987: 'This is a criminal organization, day in and day out. It makes Jim and Tammy [Bakker] look like kindergarten.'" (alteration in original)

"Today the church invents costly new services with all the zeal of its founder."

"To pay their fees, newcomers can earn commissions by recruiting new members, become auditors themselves ..., or join the church staff and receive free counseling in exchange for what their written contracts describe as a 'billion years' of labor. 'Make sure that lots of bodies move through the shop,' implored [founder] Hubbard in one of his bulletins to officials. 'Make money. Make more money. Make others produce so as to make money ... However you get them in or why, just do it.'" (second omission in original)

"To gain influence and lure richer, more sophisticated followers, Scientology has lately resorted to a wide array of front groups and financial scams."

"Over five months, the Gearys say, they spent $130,000 for services, plus $50,000 for

'gold-embossed, investment-grade' books signed by Hubbard. Geary contends that Scientologists not only called his bank to increase his credit- card limit but also forged his signature on a $20,000 loan application."

"HealthMed, a chain of clinics run by Scientologists, promotes a grueling and excessive system of saunas, exercise and vitamins designed by Hubbard to purify the body. Experts denounce the regime as quackery and potentially harmful, yet HealthMed solicits unions and public agencies for contracts."

"Hubbard's purification treatments are the mainstay of Narconon, a Scientology-run chain of 33 alcohol and drug rehabilitation centers--some in prisons under the name 'Criminon'--in 12 countries. Narconon, a classic vehicle for drawing addicts into the cult, now plans to open what it calls the world's largest treatment center...."

"Three Florida Scientologists, including Ronald Bernstein, a big contributor to the church's international 'war chest,' pleaded guilty in March to using their rare-coin dealership as a money laundry. Other notorious activities by Scientologists include making the shady Vancouver stock exchange even shadier (*see box*) and plotting to plant operatives in the

World Bank, International Monetary Fund and Export-Import Bank of the U.S. The alleged purpose of this scheme: to gain inside information on which countries are going to be denied credit so that Scientology-linked traders can make illicit profits by taking 'short' positions in those countries' currencies."

"The Feshbachs command a staff of about 60 employees and claim to have earned better returns than the Dow Jones industrial average for most of the 1980s. And, they say, they owe it all to the teachings of Scientology, whose 'war chest' has received more than $1 million from the family. The Feshbachs also embrace the church's tactics; the brothers are the terrors of the stock exchanges. In congressional hearings in 1989, the heads of several companies claimed that Feshbach operatives had spread false information to government agencies and posed in various guises--such as a Securities and Exchange Commission official--in an effort to discredit their companies and drive the stocks down."

"Scientology mischiefmaking has even moved to the book industry.... Scientology has sent out armies of its followers to buy the group's books at such major chains as B. Dalton's and Waldenbooks to sustain the illusion of a best-selling author. A former Dalton's manager

says that some books arrived in his store with the chain's price stickers already on them, suggesting that copies are being recycled."

"Scientology devotes vast resources to squelching its critics."

"Those who criticize the church--journalists, doctors, lawyers and even judges--often find themselves engulfed in litigation, stalked by private eyes, framed for fictional crimes, beaten up or threatened with death."

"One of Scientology's main strategies is to keep advancing the tired argument that the church is being 'persecuted' by anti-religionists. It is supported in that position by the American Civil Liberties Union and the National Council of Churches. But in the end, money is what Scientology is all about. As long as the organization's opponents and victims are successfully squelched, Scientology's managers and lawyers will keep pocketing millions of dollars by helping it achieve its ends."

The Church of Scientology International ("CSI") filed a complaint for libel against defendants, challenging as false and defamatory several statements from the Article. The statements, numbered by the Court but otherwise as set forth in the complaint, are as follows:

1. "[T]he Church ... survives by intimidating members and critics in a Mafia- like manner."

2. "Scientology is quite likely the most ruthless, the most classically terroristic ... cult the country has ever seen."

3. "Those who criticize the church – journalists, doctors, lawyers and even judges – often find themselves framed for fictional crimes, beaten up or threatened with death."

4. "Occasionally a Scientologist's business antics land him in jail. Last August a former devotee named Steven Fishman began serving a five-year prison term in Florida. His crime: stealing blank stock confirmation slips from his employer, a major brokerage house, to use as proof that he owned stock entitling him to join dozens of successful class-action lawsuits. Fishman made roughly $1 million this way from 1983 to 1988 and spent as much as 30% of the loot on Scientology books and tapes. Scientology denies any tie to the Fishman scam, a claim strongly disputed by both Fishman and his longtime psychiatrist, Uwe Geertz, a prominent Florida hypnotist. Both men claim that when arrested, Fishman was ordered by the Church to kill Geertz and then do an 'EOC,' or end of cycle, which is Church jargon for suicide."

5. "One source of funds for the Los Angeles-based church is the notorious, self-regulated stock exchange in Vancouver, British Columbia, often called the scam capital of the world."

6. "Baybak, 49, who runs a public relations company staffed with Scientologists, apparently has no ethics problem with engineering a hostile takeover of a firm he is hired to promote."

7. "'What these guys do is take over companies, hype the stock, sell their shares, and then there's nothing left....'" "'They stole this man's property.'" [Referring to William Jordan.]

8. "THE LOTTICKS LOST THEIR SON, Noah, who jumped from a Manhattan hotel clutching $171, virtually the only money he had not yet turned over to Scientology. His parents blame the church and would like to sue but are frightened by the organization's reputation for ruthlessness."

9. "His death inspired his father Edward, a physician, to start his own investigation of the church. 'We thought Scientology was something like Dale Carnegie,' Lottick says. 'I now believe it's a school for psychopaths. Their so-called therapies are manipulations. They take the best and brightest people and destroy them.'"

10. "It was too late. 'From Noah's friends at Dianetics' read the card that accompanied a bouquet of flowers at Lottick's funeral. Yet no Scientology staff members bothered to show up."

11. "The next month the Rowes flew to Glendale, Calif., where they shuttled daily from a local hotel to a Dianetics center. 'We thought they were

brilliant people because they seemed to know so much about us,' recalls Dee. 'Then we realized our hotel room must have been bugged.' After bolting from the center, $23,000 poorer, the Rowes say, they were chased repeatedly by Scientologists on foot and in cars."

12. "In a court filing, one of the cult's many entities – the Church of Spiritual Technology – listed $503 million in income just for 1987."

By Opinion and Order dated November 23, 1992, this Court granted defendants' motion to dismiss plaintiff's claims regarding certain statements in the complaint, on the grounds that they could not be read as referring to plaintiff. *See Church of Scientology Int'l* v. *Time Warner, Inc.*, 806 F. Supp. 1157 (S.D.N.Y. 1992). Specifically, the Court found that parts of paragraph 4 and paragraphs 6, 7, 11, and 12 above do not allege statements that could reasonably be considered to be of and concerning CSI.

By Opinion and Order dated November 15, 1995, this Court granted summary judgment for defendants as to paragraphs 1-4 and 8-10 above on the grounds that no reasonable jury could find that these statements were published with malice. *See Church of Scientology Int'l* v. *Time Warner, Inc.*, 903 F. Supp. 637 (S.D.N.Y. 1995). Thus the only statement remaining in the case is paragraph 5 above. Defendants moved for reargument of the motion for summary judgment on the grounds that the Court overlooked their argument that the claim regarding paragraph 5 above should be dismissed based on the

incremental harm doctrine. The Court granted the motion for reargument and accepted further briefing on the question of summary judgment as to paragraph 5 above based on the doctrine of incremental harm.

DISCUSSION

I. Distinctions Between the Libel-Proof Plaintiff, Incremental Harm, and Subsidiary Meaning Doctrines

There are three relevant related doctrines under which courts have granted judgment for defendants in libel suits: (1) the libel-proof plaintiff doctrine, (2) the incremental harm doctrine, and (3) the subsidiary meaning doctrine. Because these separate doctrines have not always been distinguished, and because the terms are not used consistently, some definition of the doctrines for purposes of this Opinion is in order.

The libel-proof plaintiff doctrine reasons that when a particular plaintiff's reputation for a particular trait is sufficiently bad, further statements regarding that trait, even if false and made with malice, are not actionable because, as a matter of law, the plaintiff cannot be damaged in his reputation as to that trait. *See, e.g.*, *Guccione* v. *Hustler Magazine, Inc.*, 800 F.2d 298, 303 (2d Cir. 1986) (holding that plaintiff's reputation regarding adultery rendered him libel proof as to allegations of adultery, even though allegations related to a time period when plaintiff was no longer married, and hence was no longer committing adultery), *cert. denied*, 479 U.S. 1091, 107 S.Ct. 1303, 94 L.Ed.2d 158 (1987); *Cardillo* v. *Doubleday & Co., Inc.*, 518 F.2d 638, 639-40 (2d Cir. 1975) (holding that plaintiff, a habitual criminal, was libel proof as to allegations of

criminal activity at issue, because his existing reputation created by past indictments and convictions could not be worsened by the alleged false statements).

The incremental harm doctrine reasons that when unchallenged or nonactionable parts of a particular publication are damaging, another statement, though maliciously false, might be nonactionable on the grounds that it causes no harm beyond the harm caused by the remainder of the publication. *See Masson* v. *New Yorker Magazine, Inc.*, 501 U.S. 496, 522, 111 S.Ct. 2419, 2435-36, 115 L.Ed.2d 447 (1991); *Simmons Ford, Inc.* v. *Consumers Union of U.S., Inc.*, 516 F. Supp. 742, 750 (S.D.N.Y. 1981) (Weinfeld, J.) ("Given the abysmal performance and safety evaluations detailed in the article, plaintiffs could not expect to gain more than nominal damages based on the addition to the article of the misstatement relating to federal safety standards."). The incremental harm doctrine "thus measures the incremental harm inflicted by the challenged statements beyond the harm imposed by the rest of the publication. If that harm is determined to be nominal or nonexistent, the statements are dismissed as not actionable." *Herbert* v. *Lando*, 781 F.2d 298, 311 (2d Cir.), *cert. denied*, 476 U.S. 1182, 106 S.Ct. 2916, 91 L.Ed.2d 545 (1986).

The subsidiary meaning doctrine reasons that where a maliciously false statement implies the same ultimate conclusion as that of the remainder of the publication, which has been published without actual malice, a plaintiff cannot "base his defamation action solely on inaccuracies contained within statements subsidiary to these larger views." *Id.* Thus, having determined one or more ultimate conclusions of the

publication, and determined that those conclusions were not published with actual malice, a court must grant summary judgment for the defendant where the minor inaccuracies sued upon are subsidiary to one of the larger views which is nonactionable. *See* Jay Framson, Note, *The First Cut is the Deepest, but the Second May Be Actionable: Masson v. New Yorker Magazine, Inc. and the Incremental Harm Doctrine*, 25 Loy.L.A.L.Rev. 1483, 1516 n. 233, 1517 n. 237 (1992).

II. Application of the Three Doctrines

A. The Libel-Proof Plaintiff Doctrine

Dismissal based on the libel-proof plaintiff doctrine is not appropriate at this stage of the litigation, because it requires the Court to make factual findings regarding plaintiff's reputation for a particular trait. In addition, the doctrine has been persuasively criticized by then- Judge Scalia's opinion in *Liberty Lobby, Inc.* v. *Anderson*, 746 F.2d 1563, 1568 (D.C. Cir. 1984) ("To begin with, we cannot envision how a court would go about determining that someone's reputation had already been 'irreparably' damaged – *i.e.*, that no new reader could be reached by the freshest libel." (emphasis in original)), *vacated on other grounds*, 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

B. The Incremental Harm Doctrine

The proposition that the incremental harm doctrine is grounded in the First Amendment has been rejected by the Supreme Court in *Masson* v. *New Yorker Magazine, Inc.*, 501 U.S. at 523, 111 S.Ct. at 2436. In addition, the doctrine requires a court to measure the harm flowing from the

challenged statement as compared to the harm flowing from the rest of the publication, *see id.*, and the parties have not yet conducted discovery on the issue of damages.

Because the Court finds, as a corollary to the actual malice requirement of the First Amendment to the United States Constitution, that the subsidiary meaning doctrine bars suit on statements the implication of which, if itself published, is nonactionable, *see infra* Part II.C, the Court need not reach the question of which state law governs this suit, nor the question of whether the incremental harm doctrine bars recovery as a matter of state law.

C. The Subsidiary Meaning Doctrine

In contrast to the incremental harm doctrine, the subsidiary meaning doctrine has not been rejected by the Supreme Court, and thus, under *Herbert* v. *Lando*, 781 F.2d 298 (2d Cir.), *cert. denied*, 476 U.S. 1182, 106 S.Ct. 2916, 91 L.Ed.2d 545 (1986), is still the law in this Circuit. *See also Masson* v. *New Yorker Magazine, Inc.*, 895 F.2d 1535, 1565-66 (9th Cir. 1989) (Kozinski, J., dissenting) (stating that the subsidiary meaning doctrine set forth in *Herbert* is "very different" from the "stillborn" incremental harm doctrine, "and quite unexceptional"), *rev'd*, 501 U.S. 496, 111 S.Ct. 2419, 115 L.Ed.2d 447 (1991); *Liberty Lobby, Inc.*, 746 F.2d at 1568 n. 6 (Scalia, J.) ("[A]t some point the erroneous attribution of incremental evidence of a character flaw of a particular type which is in any event amply established by the facts is not derogatory."). In addition, unlike the incremental harm doctrine, the subsidiary meaning doctrine does bear on the First

Amendment issue of actual malice, because if a minor inaccuracy could be grounds for libel, where the ultimate conclusion which the inaccuracy supports could not be because it is published without actual malice, the protection afforded to freedom of speech by the requirement that a plaintiff prove actual malice would be undermined. *See* Erin Daly, *The Incremental Harm Doctrine: Is There Life After Masson?*, 46 Ark. L. Rev. 371, 385-86 (1993) (arguing that if one statement were privileged as based on court documents, and another minor statement could be sued upon, the privilege would be undermined). *Compare Masson*, 501 U.S. at 523, 111 S.Ct. at 2436 ("The question of incremental harm does not bear upon whether a defendant has published a statement with knowledge of falsity or reckless disregard of whether it was false or not.").

Accordingly, the Court must determine whether paragraph 5 above is subsidiary to the nonactionable views published in the remainder of the Article. *See Herbert*, 781 F.2d at 312 ("[W]e hold that if the appellees' published view that Herbert lied about reporting war crimes was not actionable, other statements – even those that might be found to have been published with actual malice – should not be actionable if they merely imply the same view, and are simply an outgrowth of and subsidiary to those claims upon which it has been held there can be no recovery."). This determination need not be based on statements proven, or conceded, to be true, *see id.*, but may be based on statements that are either unchallenged, *see Simmons Ford, Inc.*, 516 F. Supp. at 750 (considering the challenged statement in light of the meaning conveyed by the remainder of article), or nonactionable, *see Herbert*, 781 F.2d

at 312 (holding that where implication of challenged statement is same as implication of statements which, although possibly false, were not published with actual malice, challenged statement is nonactionable under subsidiary meaning doctrine). *See* Erin Daly, *The Incremental Harm Doctrine: Is There Life After Masson?*, 46 Ark. L. Rev. 371, 385-86 (1993).

As demonstrated by the quotations set forth in the Background section of this Opinion and Order, the Article, "Scientology: Cult of Greed" asserts, among other things, that Scientology, rather than being a *bona fide* religion, is in fact organized for the purpose of making money by means legitimate and illegitimate. The Article details various alleged schemes that the church allegedly uses to increase its revenues, including charging ever-increasing fees to its members, deceiving non-members through the use of front groups, manipulating securities and currency markets through the use of inside information, and evading taxes. It also criticizes the church on various other subjects, including the validity of its belief system, the harmfulness of its methods of counseling, and its tactics of combatting critics. These statements were either not challenged by plaintiff or were held to be nonactionable by the Court on the grounds that no reasonable jury could find that they were published with actual malice. The sole statement still at issue in the case ("One source of funds for the Los Angeles-based church is the notorious, self-regulated stock exchange in Vancouver, British Columbia, often called the scam capital of the world.") merely implies the same view which this Court has held to be nonactionable as not made with actual malice: that Scientology's purpose is making money by

means legitimate and illegitimate. Accordingly, the claim based on this statement must be dismissed as subsidiary to a nonactionable view expressed in the Article.

CONCLUSION

For the reasons stated above, upon reconsideration, the Court HEREBY GRANTS summary judgment for the defendants on the sole remaining statement sued upon. The action is dismissed.

SO ORDERED.

Dated: July 16, 1996

New York, New York

/s/ PETER K. LEISURE

Peter K. Leisure

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

No. 92 Civ. 3024 (PKL)

CHURCH OF SCIENTOLOGY INTERNATIONAL

Plaintiff,

v.

TIME WARNER, INC., TIME INC. MAGAZINE COMPANY, and RICHARD BEHAR,

Defendants.

OPINION AND ORDER

LEISURE, *District Judge*:

Before the Court is plaintiff Church of Scientology International's motion for an order, pursuant to Rule 54(b) of the Federal Rules of Civil Procedure and the Court's inherent authority, modifying and revising the) Court's July 17, 1996

Opinion and Order.[1/] For the reasons stated below, the motion is denied.

BACKGROUND

Because the Court has issued three prior opinions in this action, familiarity with which is presumed, the Court will briefly summarize the relevant history. In its May 6, 1991 issue, *Time* magazine ran as its cover story an article entitled "Scientology: The Cult of Greed," which was highly critical of the Church of Scientology. Thereafter, plaintiff filed this diversity action for libel against defendants Time Warner, Inc., Time Inc. Magazine Company, and Richard Behar, the author of the article, alleging that certain statements in the article were false and defamatory. Plaintiff has admitted that it is a public figure for the purposes of this action. Under *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964) and its progeny, a public figure bringing a libel action must prove, as one of the essential elements of its claim, that the defendant published the challenged material with actual malice – that is, with actual knowledge of its falsity or with) serious doubts as to its truth. *See Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 244, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986) (citing *Curtis Publ'g Co.* v. *Butts*, 388 U.S. 130, 87 S.Ct. 1975, 18 L.Ed.2d 1094 (1967); *New York Times Co.*, 376 U.S. at 279-280); *Contemporary Mission, Inc.* v. *New York Times Co.*, 842 F.2d 612, 621 (2d Cir.) (limited purpose public figure

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[1/] The Opinion and Order was dated July 16, 1996, but it was not docketed until July 17, 1996. The Court will refer to this opinion as the July 17, 1996 Opinion and Order.

case), *cert. denied*, 488 U.S. 856, 109 S.Ct. 145, 102 L.Ed.2d 117 (1988); *Mr. Chow* v. *Ste. Jour Azur S.A.*, 759 F.2d 219, 230 (2d Cir. 1985) (citing *Bose Corp.* v. *Consumers Union of United States, Inc.*, 466 U.S. 485, 511 n. 30, 104 S.Ct. 1949, 80 L.Ed.2d 502 (1984)).

By Opinion and Order dated November 23, 1992, the Court granted defendants' motion to dismiss plaintiff's claims regarding several statements in the complaint, on the grounds that those statements could not be read as referring to plaintiff. *See Church of Scientology Int'l* v. *Time Warner, Inc.*, 806 F. Supp. 1157 (S.D.N.Y. 1992). In a second Opinion and Order, dated November 15, 1995, the Court granted summary judgment to defendants with respect to all but one of the remaining statements on the grounds that no reasonable jury could find, by clear and convincing evidence, that defendants published those statements with actual malice. *See Church of Scientology Int'l* v. *Time Warner, Inc.*, 903 F. Supp. 637 (S.D.N.Y. 1995). In the July 17, 1996 Opinion and Order, the Court, upon reconsideration, granted defendant's motion for summary judgment in its entirety because the remaining statement was subsidiary) in meaning to the nonactionable views expressed in the article. *See Church of Scientology* v. *Time Warner, Inc.*, 932 F. Supp. 589 (S.D.N.Y. 1996).[2/]

[2/] The Court based this decision on the subsidiary meaning doctrine, which provides that:

> [W]here a maliciously false statement implies the same ultimate conclusion as that of the remainder of the publication, which has been published without actual malice,

On November 26, 1996, plaintiff filed the instant motion asking the Court to modify and revise its July 17, 1996 Opinion and Order. Plaintiff argues, for the first time, that although a public figure must demonstrate actual malice in order to recover substantial damages, it need not demonstrate actual malice in order to recover nominal damages.[3/] In essence, plaintiff asks the) Court to carve out an exception to the rule announced in *New York Times Co.* v. *Sullivan* by holding that a public figure plaintiff in a libel action may recover nominal damages upon a showing of falsity, despite its inability to demonstrate actual malice. This rule would allow a public figure to obtain "a declaration of falsity expressed through an award of nominal damages as an independent means of vindicating its

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> a plaintiff cannot base his defamation action solely on inaccuracies contained within statements subsidiary to these larger views. Thus, having determined one or more of the ultimate conclusions of the publication, and determined that those conclusions were not published with actual malice, a court must grant summary judgment for the defendant where the minor inaccuracies sued upon are subsidiary to one of the larger views which is nonactionable.

Id. at 594 (internal quotation marks and citations omitted).

[3/] As a preliminary matter, the Court notes that plaintiff is asking the Court to reconsider the merits of its November 14, 1995 Opinion and Order rather than its July 17, 1996 Opinion and Order. As stated above, the November 14, 1995 Opinion and Order granted partial summary judgment to defendants because plaintiff presented insufficient evidence of actual malice. Plaintiff now argues that a public figure need not demonstrate actual malice in order to avoid summary judgment.

reputation." Pl.'s Mem. Law Supp. at 3.

DISCUSSION

The Court cannot address the merits of this novel argument raised in plaintiff's motion because the motion, although labeled a "Motion to Modify" pursuant to Rule 54(b) and the Court's inherent authority, is, in substance, a procedurally defective motion for reargument. Local Civil Rule 3(j), governing motions for reargument, provides that:)

> A notice of motion for reargument shall be served within ten (10) days after the docketing of the court's determination of the original motion.... There shall be served with the notice of motion a memorandum setting forth concisely the matters or controlling decisions which counsel believes the court has overlooked.

Local Civil Rule 3(j).[4/] The standards for reargument are strictly applied in order to preserve scarce judicial resources and

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[4/] The Local Rules were amended, effective April 15, 1997, and Local Rule 3(j) was redesignated as Local Rule 6.3. Local Rule 6.3 is identical, in all material respects, to former Local Rule 3(j). Moreover, the legal standards governing Local Rule 6.3 are the same as those governing former Local Rule 3(j). *See United States* v. *$490,920 in U.S. Currency*, No. 95 Civ. 8743, 1997 WL 452360, at *1 (S.D.N.Y. Aug.7, 1997) (citing *Jones* v. *Trump*, --- F. Supp. ----, No. 96 Civ. 2995, 96 Civ. 6927, 1997 WL 394950, at *1 (S.D.N.Y. July 11, 1997)). Because this motion was filed before the Local Rules were amended, the Court will refer to the Local Rule by its former designation.

avoid piecemeal litigation.

To prevail on a motion for reargument, the movant "must demonstrate that the Court overlooked controlling decisions or factual matters that were put before it on the underlying motion." *Gill* v. *Gilder*, No. 95 Civ. 7933, 1997 WL 419983, at *2 (S.D.N.Y. July 28, 1997) (citing cases); *accord In re Asbestos Litig.*, 173 F.R.D. 87, 89 (S.D.N.Y. 1997); *Bonnie & Co. Fashions, Inc.* v. *Bankers Trust Co.*, 171 F.R.D. 79, 81-82 (S.D.N.Y.1997); *Tenenbaum* v. *Williams*, 907 F. Supp. 606, 610 (E.D.N.Y. 1995). Thus, "[t]he only proper ground on which a party may move to reargue an unambiguous order is that the court overlooked 'matters or controlling decisions' which, had they been considered, might reasonably have altered the result reached by the court." *Litton Indus.* v. *Lehman Bros. Kuhn Loeb Inc.*, No. 86 Civ. 6447, 1989 WL 162315, at *4 (S.D.N.Y. Aug. 4, 1989) (quoting *Adams* v. *United States*, 686 F. Supp. 417, 418 (S.D.N.Y.1988)) (internal quotation marks omitted), *rev'd on other grounds*, 967 F.2d 742 (2d Cir. 1992). A party may not, on a motion for reargument, raise an argument for the first time. *See Randell* v. *United States*, 64 F.3d 101, 109 (2d Cir. 1995) (citing *Morse/Diesel, Inc.* v. *Fidelity & Deposit Co.*, 768 F. Supp. 115, 166 (S.D.N.Y. 1991)), *cert. denied*, 117 S.Ct. 65 (1996); *United States* v. *Certain Funds on Deposit in Scudder Tax Free Inv. Account # 2505103*, 998 F.2d 129, 132 (2d Cir.1993) ("The principle underlying Rule 3(j) is that a party, on a motion for reargument, should not be permitted 'to advance new facts, issues, or arguments.'" (quoting *Weissman* v. *Fruchtman*, 124 F.R.D. 559, 560 (S.D.N.Y. 1989))); *Caribbean Trading & Fidelity Corp.* v. *Nigerian Nat'l*

Petroleum Corp., 948 F.2d 111, 115 (2d Cir. 1991) (citing *Schonberger* v. *Serchuk*, 742 F. Supp. 108, 119 (S.D.N.Y. 1990) ("[A] party making a motion for reargument may not, under Civil Rule 3(j), advance new facts, issues or arguments not previously presented to the Court."); *Ashley Meadows Farm, Inc.* v. *American Horse Shows Ass'n, Inc.*, 624 F. Supp. 856, 857 (S.D.N.Y. 1985)), *cert. denied*, 504 U.S. 910 (1992); *Gill*, 1997 WL 419983, at *3; *In re Asbestos Litig.*, 173 F.R.D. at 89; *Bonnie & Co. Fashions, Inc.*, 171 F.R.D. at 82; *Tennenbaum*, 907 F. Supp. at 612; *Litton Indus.*, 1989 WL 162315, at *4. Indeed, a party requesting reargument "is not supposed to treat the court's initial decision as the opening of a dialogue in which that party may then use Rule 3(j) to advance new facts and theories in response to the court's rulings." *Woodard* v. *Hardenfelder*, 845 F. Supp. 960, 966 (E.D.N.Y. 1994) (quoting *McMahan & Co.* v. *Donaldson, Lufkin & Jenrette Sec. Corp.*, 727 F. Supp. 833, 833 (S.D.N.Y. 1989)).

Furthermore, a party's failure to comply with Local Rule 3(j)'s ten-day "time limit may be adequate grounds to deny a motion to reargue." *Bensen* v. *American Ultramar Ltd.*, No. 92 Civ. 4420, 1996 WL 490702, at *3 n. 3 (S.D.N.Y. Aug.28, 1996) (citing *Virgin Atl. Airways, Ltd.* v. *National Mediation Bd.*, 956 F.2d 1245, 1255 (2d Cir.), *cert. denied*, 506 U.S. 820, 113 S.Ct. 67, 121 L.Ed.2d 34 (1992)). Courts will enforce the time limit "absent adequate) justification for ignoring it." *Algie* v. *RCA Global Communications, Inc.*, 891 F. Supp. 875, 882 (S.D.N.Y. 1994), *aff'd*, 60 F.3d 956 (2d Cir. 1995).

These requirements are fatal to plaintiff's motion. Plaintiff's

motion, by advancing an argument that was not previously presented to the Court, does not raise a proper ground for reargument. In addition, plaintiff's motion – served on November 26, 1996, over four months after the Court's July 17, 1996 Opinion and Order was docketed – is untimely.[5/] Plaintiff does not even attempt to offer an excuse for its failure to comply with Local Rule 3(j)'s ten-day time limit. Instead, plaintiff contends that the requirements of Local Rule 3(j) do not apply to its motion because its motion is a "Motion to Modify" pursuant to Rule 54(b) and the Court's inherent power rather than a motion for reargument pursuant to Local Rule 3(j). Alternatively, plaintiff argues that Local Rule 3(j)'s restrictions impermissibly limit the Court's authority, under Rule 54(b) and its inherent powers, to reconsider or modify a prior decision at any time before the entry of final judgment. These two arguments are unpersuasive.

First, a movant may not avoid the strictures of Local Rule 3(j) by styling its motion as something other than a motion for reargument because a court may properly treat an artfully drafted motion as a motion for reargument. *See Olin Corp.* v. *Insurance Co. of N. Am.*, 966 F.2d 718, 722 (2d Cir. 1992) (holding that the district court properly treated plaintiff's motion for "modification" as an untimely motion for reargument); *Virgin Atl. Airways, Ltd.*, 956 F.2d at 1254-55

5/ Moreover, as stated above, the instant motion addresses the merits of the November 15, 1995 Opinion and Order rather than the July 17, 1996 Opinion and Order. Measured from the date of that opinion, the motion is untimely by over one year.

(holding that the district court acted within its discretion in treating defendant's "Resubmitted Motion to Dismiss" under Rule 54(b) as an untimely motion for reargument); *Fonar Corp.* v. *Magnetic Resonance Plus, Inc.*, 935 F. Supp. 443, 447 (S.D.N.Y. 1996) (treating plaintiff's request for reconsideration as an untimely motion for reargument and awarding defendants attorney's fees for opposing the motion);[9] *Litton Indus.*, 1989 WL 162315, at *4 (treating plaintiff's motion under Rule 54(b) as a motion for reargument and holding that, by raising arguments which the court had previously considered, the motion failed to present a proper ground for reargument); *see also Algie*, 891 F. Supp. at 881-82 (treating defendants' motion for judgment as a matter of law under Rule 50(a) as a motion for reargument and noting that the motion was untimely and that, by raising an argument based on newly submitted evidence, the motion failed to present a proper ground for reargument). Although denominated a "Motion to Modify" pursuant to Rule 54(b) and the Court's inherent authority, plaintiff's motion is, in substance, a motion for reargument. The Court has already granted summary judgment to defendants on the grounds that plaintiff failed to present sufficient evidence of actual malice. Plaintiff now argues that it is not required to demonstrate actual malice in order to avoid summary judgment. No amount of creative lawyering can convince the Court that

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[9] In a prior decision, which was the subject of the plaintiff's request for reargument, the court granted summary judgment to defendants. *See Fonar* v. *Magnetic Resonance Plus, Inc.*, 920 F. Supp. 508 (S.D.N.Y. 1996). That decision was vacated on appeal. *See Fonar Corp.* v. *Domenick*, 105 F.3d 99 (2d Cir.1997).

the motion is anything other than a motion for reargument.

Second, Local Rule 3(j) does not impermissibly conflict with Rule 54(b). The Court has the authority under Rule 54(b), as well as under its inherent powers, to reconsider or modify a prior decision at any time before the entry of final judgment. *See* Fed.R.Civ.P. 54(b);[2] *Bensen*, 1996 WL 490702, at *3 (citing *Dictograph Prods. Co.* v. *Sonotone Corp.*, 230 F.2d 131, 134-36 (2d Cir.) (Hand, J.), *cert. dismissed*, 352 U.S. 883, 77 S.Ct. 104, 1 L.Ed.2d 82 (1956)); *Demarco* v. *Sadiker*, 952 F. Supp. 134, 141 (E.D.N.Y.1996) ("It is well established that the interlocutory orders and rulings made pretrial by a district judge are subject to modification by the district judge at any time prior to final judgment." (quoting *Conrad* v. *Beck-Turek, Ltd.*, 891 F. Supp. 962, 967 (S.D.N.Y. 1995) (quoting *In re United States*, 733 F.2d 10, 13 (2d Cir. 1984)) (internal quotation marks omitted)). However, in this District, a motion to reargue or modify a prior decision must comply with the requirements

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[2] Rule 54(b) provides, in relevant part, that:

> [A]ny order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and *the order or other form of decision is subject to revision at any time before the entry of judgment* ....

Fed.R.Civ.P. 54(b) (emphasis added). Because defendant Richard Behar's counterclaim is still pending, the July 17, 1996 Opinion and Order adjudicated fewer than all the claims of fewer than all the parties. Thus, the Court has the power, under Rule 54(b), to revise its prior orders in this case.

of Local Rule 3(j) absent a compelling reason to waive its requirements. *See Bensen*, 1996 WL 490702, at *3. Accordingly, the Court retains the discretion to consider a motion for reargument notwithstanding the movant's failure to comply with Local Rule 3(j)'s requirements, but it will only exercise this discretion when justice so requires. *See Algie*, 891 F. Supp. at 882 (stating that the ten-day time limit under Local Rule 3(j) is enforced "absent adequate justification for ignoring it"); *Litton Indus.*, 1989 WL 162315, at *5 ("[T]he Court's inherent power to reconsider its decisions should be exercised only when 'justice so demands.'" (quoting *DC Comics, Inc.* v. *Powers*, 482 F. Supp. 494, 496 (S.D.N.Y. 1979)); *Donahue* v. *Pendleton Woolen Mills. Inc.*, 719 F. Supp. 149, 151 (S.D.N.Y. 1988) (stating that "because further examination of the law shows that Thornton is entitled to proceed on his ADEA claim, it would not be in the interest of justice" to apply Local Rule 3(j)'s time limit).[2] Because the Court retains the *power* to entertain a motion for reargument, despite the movant's failure to comply with Local Rule 3(j), plaintiff's argument that Local Rule 3(j) impermissibly conflicts with Rule 54(b) is unavailing. *See Litton Indus.*, 1989 WL 162315, at *4 (finding "nothing

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[2] Plaintiff, drawing an analogy to the liberal standard governing the amendment of pleadings, contends that the Court should exercise its discretion to reconsider a prior decision unless the moving party is guilty of bad faith or undue delay. *See* Pl.'s Mem. Law Supp. at 22-23 (citing *Foman* v. *Davis*, 371 U.S. 178, 182, 83 S.Ct. 227, 9 L.Ed.2d 222 (1962) (holding that leave to amend pleadings should be freely given)). However, the Court is not aware of, and plaintiff does not cite, any authority in support of this contention. To the extent that plaintiff may attempt to amend its complaint in the future, the Court expresses no opinion on the merits of such a motion.

inconsistent with Rule 54(b) and Local Rule 3(j)").

Moreover, plaintiff has not argued, and the Court does not find, that justice requires the Court to ignore the requirements of Local Rule 3(j) in this case. Plaintiff has not demonstrated, for example, that there was an intervening change in the controlling law, that there is some new evidence available that was not available at the time of the original decision, or that there is a need to correct clear error.

CONCLUSION

For the reasons stated above, plaintiff's motion is HEREBY DENIED.

SO ORDERED.

Dated: August 27, 1997
New York, New York

/s/ PETER K. LEISURE
Peter K. Leisure

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

No. 92 Civ. 3024 (PKL)

CHURCH OF SCIENTOLOGY INTERNATIONAL

Plaintiff,

v.

TIME WARNER, INC., TIME INC. MAGAZINE COMPANY, and RICHARD BEHAR,

Defendants.

OPINION AND ORDER

LEISURE, *District Judge*:

Plaintiff Church of Scientology International brings this action for libel. Plaintiff moves to amend its Complaint to add a claim for nominal damages premised on a finding that the disputed statements are demonstrably false. For the reasons stated herein, plaintiff's motion to amend is denied.

BACKGROUND

The Court presumes familiarity with the four prior Opinions that it has issued in connection with this action. To summarize briefly, *Time* magazine ran an article entitled "Scientology: The Cult of Greed" (hereinafter, "the article") as the cover story of its May 6, 1991 issue. The article, authored by Richard Behar, raised criticisms of the Church of Scientology. Plaintiff, which admits for purposes of this action that it constitutes a public figure, filed this diversity action for libel against defendants Time Warner, Inc., Time Inc. Magazine Company, and Behar.

Under *New York Times* v. Sullivan, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964) and its progeny, a public figure pursuing a libel action must prove that the defendant published the challenged material with actual malice – that is, with actual knowledge of its falsity or with serious doubts as to its truth. *See Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 244, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986) (citing *Curtis Publ'g Co.* v. *Butts*, 388 U.S. 130, 87 S.Ct. 1975, 18 L.Ed.2d 1094 (1967)); *New York Times*, 376 U.S. at 279-280; *Contemporary Mission, Inc.* v. *New York Times*, 842 F.2d 612, 621 (2d Cir. 1988) (limited purpose public figure case); *Mr. Chow* v. *Ste. Jour Azur S.A.*, 759 F.2d 219, 230 (2d Cir. 1985) (citing *Bose Corp.* v. *Consumers Union of United States, Inc.*, 466 U.S. 485, 511 n. 30, 104 S.Ct. 1949, 80 L.Ed.2d 502 (1984)). By Opinion and Order dated November 23, 1992, the Court granted defendants' motion to dismiss plaintiff's claims regarding several statements in the Complaint. *See Church of Scientology Int'l* v. *Time Warner, Inc.*, 806 F. Supp. 1157 (S.D.N.Y. 1992). In an Opinion and Order dated November 15, 1995, the Court granted

summary judgment to defendants with respect to all but one of the remaining statements on the grounds that no reasonable jury could find, by clear and convincing evidence, that defendants published those statements with actual malice. *See Church of Scientology Int'l* v. *Time Warner, Inc.*, 903 F. Supp. 637 (S.D.N.Y. 1995). In an Opinion and Order dated July 17, 1996, the Court, upon reconsideration, granted defendants' motion for summary judgment in its entirety because the remaining statement was subsidiary in meaning to the non-actionable views expressed in the article. *See Church of Scientology* v. *Time Warner, Inc.*, 932 F. Supp. 589 (S.D.N.Y. 1996). Finally, in an Opinion and Order dated August 27, 1997, the Court denied plaintiff's motion to modify the Opinion of July 17, 1996. *See Church of Scientology Int'l* v. *Time Warner, Inc.*, 1997 WL 538912 (S.D.N.Y. Aug. 27, 1997).

In denying plaintiff's motion for modification, the Court noted, "To the extent that plaintiff may attempt to amend its complaint in the future, the Court expresses no opinion on the merits of such a motion." 1997 WL 538912, at *4 n. 8. Plaintiff now moves to amend its Complaint pursuant to Rule 15(a) of the Federal Rules of Civil Procedure.

DISCUSSION

I. Rule 15(a)

Plaintiff moves pursuant to Fed.R.Civ.P. 15(a) to amend the Complaint. Rule 15 provides in relevant part:

> A party may amend the party's pleadings once as a matter of course at any time before a

> responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, the party may so amend it at any time within 20 days after it is served. Otherwise a party may amend the party's pleading only by leave of court ... and leave shall be freely given when justice so requires.

Fed.R.Civ.P. 15(a). The Court of Appeals for the Second Circuit has stated:

> As a general matter, the district court has discretion whether or not to grant leave to amend, and its decision is not subject to review on appeal except for abuse of discretion. In exercising its discretion, the district court is required to heed the command of Rule 15(a) to grant leave to amend freely ... when justice so requires. Where it appears that granting leave to amend is unlikely to be productive, however, it is not an abuse of discretion to deny leave to amend.

Ruffolo v. *Oppenheimer & Co.*, 987 F.2d 129, 131 (2d Cir. 1993) (internal citations omitted); *see also Zahra* v. *Town of Southold*, 48 F.3d 674, 685-86 (2d Cir. 1995); *Acito* v. *IMCERA Group*, 47 F.3d 47, 55 (2d Cir. 1995); *Foman* v. *Davis*, 371 U.S. 178, 182, 83 S.Ct. 227, 9 L.Ed.2d 222 (1962) (denial not abuse of discretion where amendment would be futile); *Cresswell* v. *Sullivan & Cromwell*, 922 F.2d 60, 72 (2d

Cir. 1990) (Kearse, J.) (denial of leave to amend within district court's discretion "where the motion is made after an inordinate delay, no satisfactory explanation is offered for the delay, and the amendment would prejudice the defendant.").

II. Applying the Standard

In the instant case, the Court denies plaintiff's motion for leave to amend the Complaint because the proposed amendment would be prejudicial to defendant, plaintiff has offered no valid explanation for the lengthy delay prior to seeking to amend, and the proposed amendment would be futile.

A. Delay and Prejudice

Plaintiff filed its Complaint initiating this action on April 27, 1992. Plaintiff did not move for leave to amend its Complaint until the latter half of 1997, a delay of over five years. Plaintiff notes that it seeks to demonstrate the falsity of the disputed statements and that until it retained its present counsel it believed that the only way to do so was to state a claim for actual damages based on malicious defamation. *See* Affirmation of Burt Neuborne at ¶ 6(h). Those courts that have considered this type of justification for delay in amending have deemed the justification inadequate. *See, e.g., Church of Scientology of California* v. *Siegelman*, 94 F.R.D. 735, 739 (S.D.N.Y.1982) (denying motion to amend where only justification for three-year delay was counsel's overlooking legal theory); *Cresswell*, 922 F.2d at 72 (17-month delay because counsel was unaware of statute); *Bymoen* v. *Herzog, Heine, Geduld, Inc.*, No. 88 Civ. 1796, 1991 WL 95387, at *1-2 (S.D.N.Y. May 21, 1991) (plaintiff's purpose in amending was

to avoid adverse ruling on original claims and only excuse was that new counsel was dissatisfied with prior complaint); *Sanders* v. *Thrall Car Mfg. Co.*, 582 F. Supp. 945, 952-53 (S.D.N.Y. 1983) (noting that "the liberality with which a court grants leave to amend does not impart to litigants the privilege of reshaping their legal theories endlessly, even where there is no evidence of improper motive or dilatory tactics."), *aff'd*, 730 F.2d 910 (2d Cir. 1984). This Court follows the weight of authority and finds that plaintiff has not offered an adequate excuse for the five-year delay between the filing of the Complaint and the filing of the motion for leave to amend.

Moreover, allowing plaintiff to amend at this juncture would be highly prejudicial to defendants. The Second Circuit has explained:

> The rule in this Circuit has been to allow a party to amend its pleadings in the absence of a showing by the nonmovant of prejudice or bad faith. However, the longer the period of an unexplained delay, the less will be required of the non-moving party in terms of a showing of prejudice. In determining what constitutes "prejudice," we consider whether the assertion of the new claim would: (i) require the opponent to expend additional resources to conduct discovery and prepare for trial; (ii) significantly delay the resolution of the dispute; ...

Block v. *First Blood Associates*, 988 F.2d 344, 350 (2d Cir.

1993) (internal citations and quotations omitted). It is undisputed that prior to the extended litigation over defendants' summary judgment motion, the parties had completed discovery on the issue of actual malice. Clearly, this discovery and the litigation of the summary judgment motion that followed consumed a substantial amount of defendants' time and resources. Defendants would be prejudiced if they were forced to contest a new claim that required another round of discovery on the truthfulness of the statements and likely would engender additional motion practice. Thus, the Court denies the motion to amend because the proposed amendment would be unduly prejudicial to defendants in light of the length of the delay and the development of the proceedings. *See Bymoen*, 1991 WL 95387, at *2 ("the amendment would be particularly prejudicial where discovery has already been completed and defendant has already filed a motion for summary judgment"); *see also Cresswell*, 922 F.2d at 72 (prejudice to defendant a factor in denying leave to amend).

B. Futility

The Court also denies the motion for leave to amend on the ground that the proposed amendment would be futile, both on the merits and because the Court would not have jurisdiction over such a claim.

1. Subject-Matter Jurisdiction

The Court properly exercised jurisdiction over plaintiff's original claim under the Court's diversity jurisdiction pursuant to 28 U.S.C. § 1332. Under § 1332, the Court can exercise jurisdiction over an action when there exists complete diversity

of citizenship between plaintiffs and defendants and the amount in controversy exceeds $50,000.[1/] The Court granted summary judgment on plaintiff's initial libel claim, for which plaintiff sought damages in excess of the minimal jurisdictional amount. The proposed claim is for nominal damages, which do not satisfy the amount-in-controversy requirement. Plaintiff argues, "While the effect of lifting the cloud created by defendants' allegations cannot be easily translated into dollars and cents, its importance to church adherents and to the public at large is sufficiently intense to satisfy the jurisdictional amount." Supplemental Memorandum In Support of Plaintiff's Motion at 4. Unfortunately for plaintiff, Congress has required that parties seeking to invoke the diversity jurisdiction of the federal courts must satisfy an amount requirement calibrated in dollars and cents. Plaintiff cites to no decision where a court accepted a case under its diversity jurisdiction, despite plaintiff's failure to satisfy the amount-in-controversy requirement. This Court is not inclined to ignore Congress's explicit limitation on the Court's reach. While the Court recognizes the importance of the matter to all parties, this is not a viable forum for litigation of the proposed claim.

Nor will the Court hear the claim under the Court's supplemental jurisdiction, as codified at 28 U.S.C. § 1367.

[1/] Congress has increased the amount-in-controversy requirement for diversity jurisdiction to $75,000, effective January 17, 1997. *See* The Federal Courts Improvement Act of 1996, Pub.L. No. 104-317, s 205, 110 Stat. 3847, 3850 (1996). As the instant action was filed prior to the effective date, the old standard applies.

Defendant Behar's counterclaim remains outstanding before the Court. However, the Court will not utilize the remaining counterclaim to exercise supplemental jurisdiction over the proposed claim. Plaintiff's counsel admits that the proposed claim is novel. *See* Affidavit of Burt Neuborne at ¶ 6(h). Section 1367(c) specifically mandates that "district courts may decline to exercise supplemental jurisdiction over a claim ... if the claim raises a novel or complex issue of State law." 28 U.S.C. § 1367(c). The Court concludes that it would be inappropriate to exercise supplemental jurisdiction over the novel proposed claim.

2. The New York Times Standard

The Court also denies the motion for leave to amend because the proposed claim is not actionable under the relevant standard established by the Supreme Court. As noted previously, *New York Times* and its progeny explain that the First Amendment requires a public figure to demonstrate actual malice in order to pursue a libel claim successfully. The Court finds no support in the case law for plaintiff's position that the actual malice standard set forth in *New York Times* applies solely to libel claims for actual damages. Rather, the Court concludes that New York Times and its progeny indicate that the First Amendment mandates that a public figure must show actual malice to succeed on any libel claim without regard to the level of damages. As the Supreme Court has stated, "The New York Times standard defines the level of constitutional protection appropriate to the context of defamation of a public person." *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 342, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974); *see also Dun & Bradstreet,*

Inc. v. *Greenmoss Builders*, 472 U.S. 749, 768, 105 S.Ct. 2939, 86 L.Ed.2d 593 (White, J., concurring) (noting that the only way for a public person to challenge the truthfulness of an allegedly defamatory statement is to prove actual malice). These cases do not distinguish between libel claims for actual versus nominal damages. In rejecting an analogous attempt to limit *New York Times*, Judge Edward Weinfeld of this Court stated:

> I find this attempt to engraft an exception to the constitutional privilege, so strongly enunciated under *New York Times* and its progeny, without substance .... [T]he Supreme Court, as plaintiff's counsel recognize, has never ruled directly on this issue. Moreover, considering the First Amendment basis of the *New York Times* decision and that Court's recognition of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on the government and public officials, ... only the clearest doctrinal trend favoring the exception would justify a district court judge in affording it recognition. No such trend is discernible.

Adey v. *United Action for Animals, Inc.*, 361 F. Supp. 457, 461 (S.D.N.Y. 1973), *aff'd without opinion*, 493 F.2d 1397 (2d Cir. 1974). Judge Weinfeld's cogent reasoning is equally applicable to the proposed claim in the instant action. The Court concludes

that the proposed claim is futile because it inevitably would be dismissed for failure to satisfy the standard elucidated in *New York Times*.

CONCLUSION

For the reasons stated in this Opinion, plaintiff's motion for leave to amend its Complaint is HEREBY DENIED.

SO ORDERED.

Dated: September 8, 1998
New York, New York

/s/ PETER K. LEISURE
Peter K. Leisure

No. 00-1683

Supreme Court, U.S.
FILED
JUL 9 2001
CLERK

IN THE

Supreme Court of the United States

CHURCH OF SCIENTOLOGY INTERNATIONAL,

Petitioner,

—v.—

TIME WARNER, INC., TIME INC. MAGAZINE COMPANY and RICHARD BEHAR,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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38 pp

QUESTIONS PRESENTED

1. Whether the Court of Appeals properly applied *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964), to determine that a reasonable jury could not find statements at issue in this libel case to have been made with actual malice where defendant journalists relied upon (i) prior judicial rulings, affidavits and previously published articles and (ii) extensive interviewing of participants in the events described, when plaintiff repeatedly refused to discuss the statements it later claimed to be false and defamatory.

2. Whether the Court of Appeals properly applied *New York Times Co.* v. *Sullivan*, *supra*, in affirming the grant of summary judgment dismissing a libel claim with respect to a single sentence that it concluded was subsidiary in meaning to other nonactionable statements made without actual malice.

3. Whether in this diversity case, an effort by a public figure to secure adjudication of a libel claim without proof of actual malice by limiting the claim to "nominal damages" was properly presented by way of untimely motions under Rule 54(b) or later under Rule 15(a), Fed. R. Civ. P. where (i) no such claim had appeared in the complaint and (ii) granting the motions would have resulted in prejudice and delay and the asserted claim lacked a federal jurisdictional basis.

4. Whether, even if properly presented as a matter of procedure and subject matter jurisdiction, a public figure may, consistent with *New York Times Co.* v. *Sullivan*, *supra*, prosecute a libel action without proof of actual malice by limiting its claim to one for "nominal damages."

LIST OF PARTIES BELOW

All parties appear in the caption of the case on the cover page.

RULE 29.6 STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, Respondents state as follows: AOL Time Warner Inc., a publicly held Delaware company, is the successor company to Time Warner Inc. Time Inc., a Delaware company, is the successor company to Time Inc. Magazine Company. Time Inc. is indirectly wholly owned by AOL Time Warner Inc. AOL Time Warner Inc. has no parent company, and no publicly held company owns 10 percent or more of its stock.

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Respondents respectfully submit that the Petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit entered on January 12, 2001 should be denied because no question worthy of the Court's certiorari jurisdiction is presented and no error was committed by the court below.

COUNTERSTATEMENT OF THE CASE

The Proceedings Below

The cover article of the May 6, 1991 issue of *Time* Magazine was a report entitled "Scientology: The Cult of Greed" (the "Article") by *Time* Magazine reporter Richard Behar. (Article 50-57; A336-45)[1]

On April 27, 1992, Church of Scientology International ("CSI" or "Petitioner") commenced this libel action against Time Inc., its parent company Time Warner Inc., and Richard Behar, the author of the Article (collectively, "Time" or "Respondents"). (A1-29) CSI challenged six passages from the eight-page, 7,500-word Article, alleging that each of the passages had been published with actual malice (A13-14 ¶34), and sought "general damages in an amount to be determined at trial" and punitive damages of "no less than $416,000,000 . . . ." (A28 ¶74 *et seq.*) The complaint stated that "[t]his is an action for damages" (A2 ¶3) and identified a single "claim for relief" (A12).

In June 1992 Time moved to dismiss the complaint on the grounds that the statements, none of which mentioned CSI by name, were not about CSI but about Scientology generally, about individual Scientologists or about Scientology

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[1] A copy of the Article with the passages challenged by Petitioner identified has been lodged with the Court. Citations in the form A__ are to the Joint Appendix filed below. Citations in the form App. __ are to Appendices A-F annexed to the Petition for Writ of Certiorari.

entities other than CSI. On November 23, 1992 the district court issued an opinion concluding that two of the six allegedly defamatory passages were not of and concerning CSI. (App. B 17a-35a) As to the other four passages, the district court held that CSI's "of and concerning" allegations were sufficient to withstand the motion to dismiss but that references in two of those four passages to the activities of individual Scientologists failed to satisfy the "of and concerning" requirement.[2] *Id.*

Respondents answered the complaint and Behar also asserted counterclaims against CSI for violation of the Fair Credit Reporting Act and harassment, alleging that CSI had waged a concerted campaign of intimidation against him while he was working on the Article. (A32-54)

The parties agreed in writing to defer discovery on issues of truth and falsity. (A134-37) Recognizing that Respondents intended to bring a motion for summary judgment based on CSI's inability to establish actual malice (CSI admitted it was a public figure), and acknowledging that that motion could bring the litigation to an end, the parties agreed to focus discovery initially on issues of actual malice and other matters that could be resolved without undertaking the necessarily expensive, time-consuming and (from CSI's perspective) sensitive discovery of church executives on truth and falsity. *Id.*

For the next two-and-a-half years, CSI conducted massive discovery of Respondents and third parties on actual malice issues. Behar alone was deposed for 28 days—16½ days in this action (App. A 39a n.1), and 11½ days in a companion suit brought by an individual Scientologist, *Baybak* v.

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[2] All the statements originally put at issue in the complaint were set out by the Court of Appeals in its Opinion. (App. A 2a-5a) The statements at issue on appeal (some were abandoned by Petitioner on appeal) are identified at App. A 10a–13a.

Time Warner Inc., et al., No. 92 Civ. 3041 (S.D.N.Y. filed April 27, 1992), with the understanding that the results of that questioning would also be available for use in this litigation (A135). Time produced over 20,000 pages of documentation, as well as notes and tapes of Behar's interviews for the Article. Thirteen other persons were deposed by CSI, including eight *Time* editors and researchers.

At the close of this discovery, Respondents moved for summary judgment on all remaining statements. The motion was supported by an affidavit from Behar attaching the various court decisions, affidavits, interview notes and other materials on which he had relied for the statements in question, as well as affidavits from other *Time* personnel involved in publishing the Article (A240-1330; A191-224). On November 14, 1995 the district court granted Respondents' motion as to all but one of the remaining allegedly libelous statements, holding that no reasonable jury could find that Time had published the statements with actual malice. (App. C 36a-50a) Following reargument, the district court granted summary judgment on July 16, 1996 as to the sole remaining statement, holding that it was subsidiary in meaning to the nonactionable views expressed in the remainder of the Article. (App. D 51a-66a)[3] On July 17, 1996, the court dismissed CSI's complaint. (A2823)

Over four months later, on November 26, 1996, CSI, now represented by new counsel, moved for an order pursuant to Fed. R. Civ. P. 54(b) modifying the district court's July 17, 1996 order to reinstate its libel claim as one for nominal

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[3] The subsidiary meaning arguments were raised in the initial summary judgment motion and, in greater detail, in Respondent's Memorandum of Law on Reargument in Support of Defendants' Motion for Summary Judgment (Jan. 17, 1996), pp. 3-9, and Reply Memorandum of Law on Reargument (Jan. 31, 1996), pp. 1-2. The Petition is inexplicably in error in stating that the subsidiary meaning issue "had not been briefed or argued" prior to its adoption by the district court. (Pet. 3)

damages, which CSI proposed should be exempt from the actual malice requirement. After the district court denied the motion as an untimely attempt to reargue the summary judgment decisions (App. E 67a-78a), CSI moved for leave to amend its 1992 complaint by adding that same claim. The district court denied CSI's motion, because of unjustified delay and prejudice to defendants and because it would, in any event, be futile to allow amendment to assert such a claim because the court lacked subject matter jurisdiction over the claim in the absence of a pleading satisfying the jurisdictional amount under 28 U.S.C. § 1332 and because the claim was inconsistent with the requirements of *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964). (App. F 79a-89a)

To facilitate prompt appellate review, the parties entered into a stipulation voluntarily dismissing Behar's counterclaims without prejudice. Final judgment was entered and, on March 29, 1999, CSI filed a Notice of Appeal.

On appeal, CSI challenged, *inter alia*, the district court's ruling that various statements were made without the clear and convincing evidence of actual malice required under *Sullivan*. CSI urged that the *Time* reporter had purposefully avoided the truth because of his "extreme dislike" of Scientology. CSI conceded at oral argument, however, that what it claimed was the reporter's "extreme dislike" of Scientology was a belief held "in good faith." The following colloquy ensued:

> *The Court:* "But if he, if it's with good faith, what is wrong with that?"
>
> *Mr. Neuborne:* "Because the good faith can blind you to the truth."[4]

On January 12, 2001, the Court of Appeals entered its unanimous opinion and judgment, affirming the judgment

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[4] Copies of the audiotapes of oral argument have been lodged with the Court.

below. (App. A 1a-16a) In addition to the grounds stated in his opinion for the Court, Chief Judge Walker noted separately his view that none of the references in the Article to Scientology or to individual Scientologists was "of and concerning" CSI. (App. A 8a n.1)

Facts

In mid-1990 Richard Behar, a reporter for *Time* Magazine, proposed to his editors that he prepare an article about Scientology and received authorization to proceed. (A201; A215-16; A245-46) Behar was familiar with Scientology as a result of writing a 1986 article about it for *Forbes* Magazine. (A242-44; A347-51)

Behar worked on the *Time* story for nearly a year. (A245-51) He interviewed approximately 150 sources, including many former high-ranking Scientologists (A248; A243; *see, e.g.*, A263-68), outside experts who followed Scientology, and scores of individuals who told him about its persistent abuse of members and critics (*see, e.g.*, A284; A297-305). He spoke with present and former government officials who had dealt with Scientology and with individuals and lawyers who had sued or been sued by one or another of its many entities (*see, e.g.*, A268-72; A286-87; A292-96).

Behar made a number of efforts to talk to Scientology officials, including David Miscavige, Scientology's highest official. Scientology officials uniformly refused to speak with Behar. (A247; A219-20; A2253-54; *see also*, A244)

Before publication, CSI's counsel Earle Cooley wrote to Time complaining about Behar and his prior report in *Forbes*. *Time*'s Chief of Correspondents, John Stacks, questioned Behar and satisfied himself that Behar could report with an open mind. (A216-17) Cooley's letter focused on a charge that a former Scientology tax attorney had used his position in the Department of Justice to terminate an IRS-inspired investigation of Scientology. (A383-84) Behar had

already told Cooley that he had concluded that the charge was probably unfounded. (*Id.*; A252-53) Stacks viewed Behar's willingness to discard charges against Scientology that appeared unfounded as evidence of Behar's professionalism. (A216-17) (The charge was not reported. (A253))

Behar's editors viewed his prior reporting positively since it indicated that he had a base of knowledge and an array of contacts who could assist him in reporting on a secretive organization. (A201-02; A215-16) At his deposition, Stacks explained his view that "[a] reporter is not . . . disabled because he has, based on his investigation, formed some opinions. A contrary rule would lead to reporting only by the ignorant." (A218; *see also,* A2253-54; A2260)

Behar reviewed many affidavits from litigations involving Scientology, a large number of court rulings discussing Scientology, and dozens of published books and articles describing Scientology's harassment and abuse of its members, critics and others. (A247-48; *see, e.g.*, A255-307; A390-1226) He amassed over 20,000 pages of documents about Scientology—nearly six feet of files. (A247-48)

In one judicial opinion that Behar reviewed, for example, a California Superior Court determined that defectors from Scientology know "that the Church or its minions is fully capable of intimidation or other physical or psychological abuse if it suits their ends. The record is replete with evidence of such abuse." *Church of Scientology of California* v. *Armstrong*, No. C 420153, slip op. at 7-8 (Cal. Super. Ct. June 20, 1984). (A360) The court made specific credibility findings that the testimony of defectors (a number of whom were Behar's sources) was "credible" and "extremely persuasive" and that "their testimony was precise, accurate, and rang true." (A359)

Behar's pre-publication files contain a host of statements, many made under oath, attesting to efforts by Scientology to threaten critics, adherents, lawyers, judges and others with

physical harm (including death); frame them for crimes; or spread false and defamatory rumors about them.[5] (*See*, *e.g.*, A263-83; A643-868; A969-70; A942-51; A953-61; A904-12.) As one example, Behar knew that Vicki Aznaran, former President of Scientology's Religious Technology Center ("RTC"), had sworn in an affidavit that Scientology routinely engaged in "burglaries, assaults, disruption of enemies' businesses, spying, harassive investigations, abuse of confidential communications in parishioner files and so on." (A646)

Aznaran's affidavit also stated that attacks on its enemies were part of Scientology "scripture" and that Scientology founder L. Ron Hubbard had "encourage[d] Scientologists to pursue litigation purely for harassment without regard to the merits of a claim to cause enemies to fold" and had also written that "[t]he law can be used very easily to harass, and . . . will generally be sufficient to cause [the enemy's] professional decease. If possible, of course, ruin him entirely." (A264; *see* A643-50; A658)

Behar also knew that another former high-ranking Scientology official, William Franks, had sworn that he had "personal knowledge" of many orders issued by Hubbard concerning Michael Flynn (an attorney who had represented victims of Scientology in litigation against the Church):

> "Hubbard ordered him to be totally ruined. We were ordered to do a complete investigation of Flynn, find

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[5] Behar was aware that the church regularly harassed journalists who criticized it. (A301-06) He experienced the church's tactics as the Article was being prepared. As is reported in a sidebar accompanying the Article, entitled "The Scientologists and Me" (Article 57), Behar was subjected to harassment, including surveillance by private investigators and illegal acquisition of his credit report; his neighbors and acquaintances were questioned about him; and private investigators contacted Behar posing as victims of Scientology in an effort to elicit negative statements. (A251-54; A306-07) Behar's report of these incidents was not challenged by Petitioner in its complaint.

> or '*manufacture*' crimes he had committed, expose his 'crimes' to his clients and to law enforcement officials, ruin his law practice, have him disbarred and file numerous law suits or bar complaints against him without regard to whether the complaints were meritorious or not." (A732, emphasis in original)

Having read this strongly worded and remarkably consistent criticism of Scientology, and having experienced Scientology's efforts to harass and intimidate him, Behar believed—and relied upon—the numerous sources who told him of specific instances of intimidation, harassment, falsification and other misconduct by Scientology.

The Article is highly critical of Scientology itself and of the activities of a number of individual Scientologists. (CSI is named only once in the Article. *See* Article 56.) Scientology officials responded forcefully to the Article. They issued an 80-page rebuttal, which they sent to church members, business leaders and political figures. (App. C 38a n.1) They published many pages of advertisements in *USA Today*, including a 27-page advertising supplement, challenging the Article and denouncing *Time*. (*Id.;* A2422) They brought suits against various individuals quoted in the *Time* article. Finally, the day before the statute of limitations would have run, CSI commenced this action. (A1-29)

CSI's lawsuit challenges only a few statements—some quite narrow—contained in the eight-page Article.[6] The

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[6] Many of the Article's most far-reaching charges are contained in passages that CSI did *not* challenge, including statements that:

- Scientology is "The Thriving Cult of Greed and Power. Ruined lives. Lost fortunes. Federal crimes. Scientology poses as a religion but is really a ruthless global scam—and aiming for the mainstream." (Article 50)
- Scientology, according to one of its former key leaders, "'is a criminal organization, day in and day out, [that] makes Jim and Tammy [Bakker] look like kindergarten.'" (Article 51)

Footnote continued on next page.

statements originally challenged are set out in the opinion of the Court of Appeals at App. A 2a-5a; those that were at issue on appeal are identified at App. A 10a-13a.

REASONS FOR DENYING THE WRIT

Summary of Argument

None of the three questions assertedly presented for this Court's review reflects a conflict within the circuits. No circuit conflict is even claimed. Nor does the Court of Appeals' decision depart from this Court's libel teachings. Each of the issues purportedly raised was decided correctly below. And

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Footnote continued from previous page.

- Paulette Cooper, author of a book critical of Scientology, was the target of "a Scientology plot (called Operation Freak-Out) whose goal, according to church documents, was 'to get P.C. incarcerated in a mental institution or jail'" and "by impersonating Cooper, Scientologists got her indicted in 1973 for threatening to bomb the church." (Article 57)
- "in the end, money is what Scientology is all about. As long as the organization's opponents and victims are successfully squelched, Scientology's managers and lawyers will keep pocketing millions of dollars by helping it achieve its ends." (Article 57)

Even in the broadest passages quoted by CSI in its complaint, CSI did not challenge the highly critical passages that are italicized:

- "In reality the church is *a hugely profitable global racket* that survives by intimidating members and critics in a Mafia-like manner." (Article 50)
- "Says Cynthia Kisser, the [Cult Awareness] network's Chicago-based executive director: 'Scientology is quite likely the most ruthless, the most classically terroristic, *the most litigious and the most lucrative* cult the country has ever seen. *No cult extracts more money from its members.*'" (Article 51)
- "Those who criticize the church—journalists, doctors, lawyers and even judges—often find themselves *engulfed in litigation, stalked by private eyes*, framed for fictional crimes, beaten up or threatened with death." (Article 56)

at least two of the three issues identified by the Petition are not properly before this Court at all.

First, the challenge to the conclusion below that CSI had failed to establish the "actual malice" required for public figures in *Sullivan* libel cases is rooted in a misstatement of the Second Circuit's opinion as to the relevance of alleged "bias." The Court of Appeals did not state, as the Petition contends, that a defendant's "bias 'and even his exaggerations, enhances, rather than diminishes, the likelihood that' his defamatory statements were made without actual malice. (App. A, 10a)." (Pet. 18) Rather it, like the district court, concluded—unexceptionally—that a libel defendant's "'*belief in his statements*, even his exaggerations, enhances, rather than diminishes, the likelihood that they are protected.'" (App. A 10a, quoting App. C 40a) The Petition's omission of the italicized words from the Second Circuit's opinion distorts the Court of Appeals' meaning, for the belief in the truth of one's words is the antithesis of actual malice under this Court's holdings in *Sullivan* and its progeny. The Petition can cite no circuit authority suggesting that such belief can constitute a basis for actual malice, and the question Petitioner would have this Court decide is presented only through this distorted quotation.

Second, the Petition suggests that the Second Circuit's unwillingness to find subsidiary meanings independently actionable conflicts with this Court's rejection of the so-called incremental harm doctrine in *Masson* v. *New Yorker Magazine, Inc.*, 501 U.S. 496 (1991). In fact, however, Judge Kozinski's dissenting opinion in the Ninth Circuit in *Masson*, vindicated in this Court's subsequent opinion, expressly evaluated the Second Circuit's subsidiary meaning approach and concluded that it is "very different" from the incremental harm doctrine which it (and, later, this Court) found to be without constitutional roots. *Masson* v. *New Yorker Magazine, Inc.*, 895 F.2d 1535, 1565-66 (9th Cir. 1990) (Kozinski, J., dissenting), *rev'd*, 501 U.S. 496 (1991). Judge Kozinski

recognized, as had the Second Circuit, that it is "quite unexceptional" to determine that statements that imply the "identical view" to those already found to have been made without actual malice, are nonactionable. *Id.* at 1565.

Finally, the most far-reaching of Petitioner's positions, the assertion that this Court should endorse a new libel cause of action for nominal damages wholly exempt from the fault requirements of *Sullivan*, is not properly presented here at all. It was correctly rejected by the district court not only on the merits as inconsistent with this Court's holding in *Sullivan*, but also on procedural grounds as untimely under the local rules governing reargument and as likely to cause delay and prejudice. The district court also declined to exercise jurisdiction over this newly asserted and novel state-law claim that lacked the requisites of federal diversity jurisdiction.

I.

The Court of Appeals' Treatment of a Speaker's Belief in His Statement as Supporting the Absence of Actual Malice Is Consistent with This Court's Decisions and Presents No Conflict Among the Circuits

The Court of Appeals' application of the actual malice standard was central to its disposition of the entire appeal below since each of the statements at issue was held to have been properly dismissed for lack of the clear and convincing proof of actual malice required by this Court's decisions in *Sullivan*, or because the statement was "subsidiary in meaning to statements made without actual malice." (App. A 16a)

The Petition contends that *Time* reporter Richard Behar harbored bias against Scientology and that the Court of Appeals held that

> "Behar's anti-Scientology bias 'and even his exaggerations, enhances, rather than diminishes, the likelihood that' his defamatory statements were made without actual malice. (App. A, 10a)." (Pet. 18)

The Petition labels this an "astonishing conclusion." *Id.* But that is not what the opinion of the Court of Appeals said. Rather, the Court of Appeals quoted with approval the district court's statement that

> "the 'speaker's belief in his statements, even his exaggerations, enhances, rather than diminishes, the likelihood that they are protected.'" (App. A 10a)

The court's focus on the "speaker's belief in his statements" (words omitted from the Petition's quotation) fairly reflects this Court's teachings as to the meaning of actual malice. One who has a belief in his statement is one who has not acted with either knowledge of falsity or "serious doubts as to the truth of his publication." *St. Amant* v. *Thompson*, 390 U.S. 727, 731 (1968). As *Sullivan* itself recognized in defining actual malice, the key question is whether the statement constitutes "what the defendant believes to be truthful information . . . ." 376 U.S. at 280-81. The Court of Appeals' opinion does not depart from this Court's teachings.

The question of Behar's beliefs arose in the context of Petitioner's claim that Behar was "biased" against Scientology and had fixed views that precluded him from perceiving the truth. It was also argued that Behar's alleged bias (which no court below held actually existed) led him to purposefully avoid the truth. *See Harte-Hanks Communications, Inc.* v. *Connaughton*, 491 U.S. 657 (1989).

One person's "bias," of course, is another's belief based on facts he or she has learned. Here, Petitioner itself acknowledged to the Court of Appeals that Behar's beliefs about Scientology were held in "good faith." (*See* p. 4 above.) Such "good faith" belief is, in and of itself, inconsistent with actual malice.

As the Court of Appeals noted, the district court entertained the possibility that bias could be relevant in advancing a claim of purposeful avoidance of the truth in the reporting process. (App. A 10a) But the factual predicate needed to

embark on such analysis was lacking here, for as the courts below noted, "'plaintiff has failed to demonstrate the correlative circumstance of inadequate investigation to make its evidence of bias probative of actual malice, rather than probative of lack thereof' . . . ." (App. A 10a, quoting App. C 41a) Absent factual circumstances like those in *Harte-Hanks*, the strongly held beliefs CSI ascribed to Behar simply did not begin to raise an issue of actual malice.[7]

The Court of Appeals did not simply rest on that general principle in affirming the absence of actual malice here. It engaged in a review of the specific allegations of actual malice with respect to the individual statements at issue. That review rebuts Petitioner's contention that sufficient evidence of actual malice had been presented (Pet. 22), whatever the treatment of Behar's "beliefs."

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[7] In *Harte-Hanks* this Court found purposeful avoidance where the media defendant had published (1) a "highly improbable" story of bribery in the context of a judicial election (2) based upon an admittedly questionable source despite (3) unambiguous denials given by the plaintiff in a personal interview and (4) denials as well by *all* other witnesses who were interviewed (there were five); where (5) the one witness the reporters were not instructed to interview was in the best position to confirm or deny the source's account of the events, (6) she had been readily available and (7) her denial would have demonstrated convincingly that the story was false; and where (8) the defendant had failed to review two readily available audiotapes of the events at issue, which could easily have verified or disproved the allegations; and where (9) defendant publisher endorsed plaintiff's opponent in the judicial election. *Harte-Hanks*, 491 U.S. at 660, 682, 691-92.

Time's extensive research, including judicial decisions, affidavits, previously published reports and interviews of sources whom Behar credited and whose accounts were both mutually supportive and wholly consistent with prior reported conduct on the part of Scientology, is precisely the opposite of the *Harte-Hanks* account. The purposeful avoidance contention is particularly weak coming from an organization that consistently refused to answer the questions of a reporter it now accuses of having purposefully avoided the truth.

The Petition refers to "general charges that CSI's leadership operates in a 'mafia-like,' 'terrorist' way to fleece credulous people of their money." (Pet. 5) It then describes two "specific examples of alleged misbehavior": (1) allegations that Scientology ordered Steven Fishman to murder his therapist and then commit suicide in order to cover up CSI's alleged involvement in a fraudulent plan to use forged stock-confirmation slips to participate in class action recoveries, and (2) allegations that Scientology had financially squeezed Noah Lottick until he was destitute and then abandoned him to suicide. (*Id.*)

In its discussion of actual malice, the Petition refers only to Fishman, apparently by way of example. (Pet. 22-24) We, like the Court of Appeals, first address what CSI labels the "general charges" and then turn to the Fishman example discussed in the Petition.

A. The "Intimidation" Statements

The broadest statements at issue in this lawsuit—referred to in the Petition as the "general charges" (Pet. 5)—were those quoted in paragraph 40 of CSI's complaint:

> "'[T]he church . . . survives by intimidating members and critics in a Mafia-like manner.'"
>
> * * *
>
> "'Scientology is quite likely the most ruthless, the most classically terroristic . . . cult the country has ever seen.'"
>
> * * *
>
> "'Those who criticize the church—journalists, doctors, lawyers and even judges—often find themselves [. . .] framed for fictional crimes, beaten up or threatened with death.'" (A14-15 ¶ 40, quoting Article 50, 51, 56)

Behar's belief in the statements at issue was supported by a mass of information about Scientology's harassment and

intimidation of its members and critics. The dozens of specific examples that were known to Behar and that supported his belief in the truth of the statements are described in detail in his affidavit in support of summary judgment and the attached exhibits (A240-333; A335-1330).

In addition to the stinging description of a church capable of "intimidation or other physical or psychological abuse" that appears in the California Superior Court's *Armstrong* decision (discussed at p. 6 above) and an English court's comparison of Scientology's tactics to those of "Hitler and his henchmen," *In re: B and G (Wards)*, [1984] F.L.R. 134, 38-39, 46 [Family Division] (A492-93), Behar reviewed decisions from other courts that had, after conducting hearings, reached similarly harsh conclusions about Scientology's intimidation of its critics and dissidents.

One example was the decision in *Wollersheim* v. *Church of Scientology of California*, 260 Cal. Rptr. 331 (1989) (A390-413), a case brought by a former Scientologist, which found that Scientology intimidated its perceived enemies through psychological coercion, physical restraint and

> "a practice of retribution and threatened retribution—often called 'fair game'—against members who left or otherwise posed a threat to the organization. . . ." (A394)

> "In the instant case, at least, the prime focus of the 'fair game' campaign was against the 'heretic' Wollersheim's economic interests. . . . Substantial evidence supports the conclusion Scientology leaders made the deliberate decision to ruin Wollersheim economically and possibly psychologically." (A400-1)

The court also credited Wollersheim's testimony that Scientology had continued to use "fair game" practices notwithstanding the church's public rejection of the policy. (A403) Wollersheim was also, according to the court, held "captive"

and forced to take part in Scientology activities "under threat of physical compulsion." (A404)

Behar reviewed other decisions that described Scientology's total disregard for the law in its campaign against its enemies. One court determined that the Church of Scientology had "filed false tax returns, burglarized IRS offices, stole[n] IRS documents, and harassed, delayed and obstructed IRS agents who tried to audit [its] records." *Church of Scientology* v. *C.I.R.*, 83 T.C. 381, 505 (1984). (A513)

Behar also relied on sworn statements submitted in court by a number of high-ranking Scientologists who had defected from the church (some of which are discussed at pages 7-8 above). (A263-68; A643-50; A661-62; A730-37; A754-812)

Behar's identification of four groups of critics who suffered at the hands of the Scientology movement—journalists, doctors, lawyers and judges—was supported by a wealth of information recognized in the decision below. (App. A 10a-11a) The various examples of mistreatment of each of these groups—threats, "frame-ups" and abuse—all known to Behar prior to publication, amply support the statement relating to critics of Scientology that is quoted in paragraph 40 of CSI's complaint.

They provide, as well, additional support for the other two statements challenged in paragraph 40, *i.e.*, the conclusion that Scientology "survives by intimidating members and critics in a Mafia-like manner" and the quoted opinion of Cynthia Kisser, head of the Cult Awareness Network, a cult monitoring group, that Scientology is "quite likely the most ruthless [and] terroristic . . . cult the country has ever seen." Other explicit support for these characterizations was known to Behar from an interview with former Clearwater, Florida mayor Gabriel Cazares and from the sworn trial and deposition testimony of a former Scientology member and its former lawyer. (A285-87; A268-69, n.14)

Petitioner's inability to deal with statements it describes as "general charges," and the evidence supporting them, reflects a continuing effort by CSI to wrench the overall actual malice analysis from the factual context in which it arises.

B. The Fishman Statements

CSI challenged two paragraphs of the Article describing "a Scientologist's business antics" which "had land[ed] him in jail":

> "Occasionally a Scientologist's business antics land him in jail. Last August a former devotee named Steven Fishman began serving a five-year prison term in Florida. His crime: stealing blank stock-confirmation slips from his employer, a major brokerage house, to use as proof that he owned stock entitling him to join dozens of successful class-action lawsuits. Fishman made roughly $1 million this way from 1983 to 1988 and spent as much as 30% of the loot on Scientology books and tapes.
>
> "Scientology denies any tie to the Fishman scam, a claim strongly disputed by both Fishman and his longtime psychiatrist, Uwe Geertz, a prominent Florida hypnotist. Both men claim that when arrested, Fishman was ordered by the church to kill Geertz and then do an 'EOC,' or end of cycle, which is church jargon for suicide." (Article 55)

The district court noted that much of the Fishman passage was not of and concerning CSI. (App. B 29a)[8] The court accepted the possibility, however, that a reference to "the church" in a sentence concerning a claim by Fishman and Dr. Geertz could be understood to mean CSI. *Id.* Even

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[8] Failure to satisfy the "of and concerning" requirement provides an alternative basis for disposition of CSI's claims. See App. A at 8a, n.1.

if it were assumed that "church" here refers to the CSI, Behar plainly lacked actual malice in describing this incident.

Behar reported "claims" concerning the church, which he explicitly attributed to Fishman and to Dr. Geertz. He had interviewed each of them and found them to be credible. (A326-27; *see generally*, A317-28; A150-51) Behar also relied on Dr. Geertz's sworn testimony at Fishman's sentencing hearing, where Dr. Geertz had stated that Fishman revealed in hypnosis sessions in 1990 that Scientology had ordered him to kill Dr. Geertz and do an "EOC"—end of cycle—which he understood to mean commit suicide. Dr. Geertz had taken this threat seriously and reported it to the FBI. (A319-21; A1169-70; A1177) This is the death threat and suicide order that Behar referred to in the Article.

Dr. Geertz had testified about having treated Fishman over more than twenty years, often through the use of hypnosis. (A320; A1142-44) He noted Fishman's continuing ties with Scientology while under his care, Scientology's hostility to psychiatrists and psychologists, and Scientology's efforts to undo Dr. Geertz's work with Fishman. (A320; A1143; A1148-51; A1153-55; A1157-58)

Behar had reviewed Dr. Geertz's resume, which describes in detail his impressive training, experience, awards and published works. (A319-20; A1270-78) Behar knew that U.S. District Judge Lowell Jensen had accepted Dr. Geertz as a qualified forensic psychologist. (A319; A1142) Aware of Fishman's schizophrenia, Behar credited Fishman's account of the death threat and suicide order in large part because of Dr. Geertz's ability, based on his decades of experience, to distinguish what was real from what was not in Fishman's statements. (A323; A326-27; A151-52) Dr. Geertz told Behar that Fishman was telling the truth about the EOC and death threat order in 1990. (A323; A150)

Petitioner argues that Behar knew the references to a death threat and EOC were false because he knew that Fish-

man had earlier pleaded guilty to obstruction of justice after having set up a phony death threat. Behar did not believe that Fishman's guilty plea undermined Dr. Geertz's testimony. (A321 n.47; A323-24) The death threat that had led to the obstruction of justice conviction had occurred earlier, in 1988, and involved a purported threat against Fishman's defense lawyer, Nurik, in the stock scam case. When interviewed, Nurik told Behar that it was his view that the clumsily contrived threat had been hatched "in conjunction" with Scientology to sabotage Fishman's defense in the stock scam case and that Fishman had purposely undermined his own defense to protect the church from involvement. (A673-74; A321 n.47) The death threat and EOC instruction reported by Time occurred more than a year and a half later, in 1990.

Dr. Geertz did not take seriously the earlier threats, but he believed the 1990 threats. (A320-22; A1169-70) Behar credited Dr. Geertz's insight, gained through years of treating Fishman, as to the reality of the different threats. (A323) Behar also recognized that the whole pattern was strikingly similar to other convoluted Scientology plots to frame those who posed trouble for the church.[9]

Behar also spoke with the federal prosecutor, Robert Dondero, about Scientology and Fishman. (A324) Dondero noted that Scientology had denied that Fishman had had more than a brief involvement with the church, but acknowledged that Dr. Geertz had said the tie between Fishman and

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[9] Behar knew of elaborate schemes established by Scientology to frame others (for example, author Paulette Cooper, lawyer Michael Flynn and Clearwater Mayor Gabriel Cazares, each of whom had been framed for alleged criminal wrongdoing after criticizing the church). (Cooper: A301-02; A946; A830; Flynn: A265-66; A293-94; A438; A732; A947; Cazares: A278-79; A824; A830; A956) Suicide by Scientology adherents also was an omnipresent issue. Behar was familiar with reports of suicides of loyal Scientologists in the U.S. and abroad, including that of Noah Lottick, reported on in the Article.

the church went back many years. (*Id.*) Behar spoke with others who confirmed Dr. Geertz's statement and disputed Scientology's statement, upon which Dondero had relied, about the brevity of Fishman's Scientology involvement. Vicki Aznaran, a prominent Scientology defector, confirmed that Fishman had been a Scientology member around 1978 when she joined. (A324; A667) Aznaran's view was supported by Dr. Richard Ofshe, a sociologist who studied cult behavior and worked with the Fishman defense. (A324-25; A723-24) In Behar's mind, by contradicting the basic claim Scientology had made to prosecutor Dondero—that Fishman was a recent, neophyte member—these sources undermined Scientology's denials to Dondero. (A324-26; A706)[10]

Everything that Behar reported about the EOC and death threat was corroborated by Dr. Geertz, who was in the best position to observe Fishman and to evaluate his claims. Fishman's counsel, Nurik, gave his view that his client had purposefully undermined his own defense to aid Scientology. Dr. Ofshe and Vicki Aznaran confirmed a key aspect of Fishman's claim: his long-term involvement with Scientology. Scientology itself refused to speak with Behar, denying him the opportunity to discuss the Fishman and Geertz claims with church officials.[11] In the world of Scientology with which Behar was familiar, where frame-ups have a long history, where preying on those with psychological problems

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[10] CSI's emphasis on Dondero's response to Fishman's statement that Scientology had murdered three people (Pet. 24) is based on portions of the transcript that Behar simply did not have. (A319 n.45; A147-48) It also misses the point with respect to Fishman's reliability: There is an obvious difference in significance between reliance on what Fishman had heard from others about what Scientology had done to third parties and reliance on what Fishman knew Scientology had done to him.

[11] CSI's lawyer, in a December 18, 1990 letter to Time, could be understood to deny any link to Fishman's stock scam (although the letter curiously stops short of saying so), and this was reported in the Article. (A1282-83; Article 55)

is a way of life, and where sustained intimidation and abuse of critics is the rule and not the exception, Fishman and Geertz's account is one that Behar had every reason to credit.[12] Behar believed Geertz and Fishman, and the courts below correctly concluded that CSI could not demonstrate that the Fishman statement was published with actual malice.[13]

II.

The Dismissal of a Statement Because It Was Subsidiary in Meaning to Statements Held to Have Been Made Without Actual Malice Does Not Conflict with This Court's Decision in *Masson* Nor with Decisions of Any Other Circuit

It is the central contention of the Petition with respect to the Court of Appeals' reference to the "subsidiary meaning" approach that this doctrine is identical to the "incremental harm" doctrine held not to be constitutionally mandated in *Masson* v. *New Yorker Magazine*, 501 U.S. 496. But the

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[12] CSI argues that Behar did not speak to the FBI agents who investigated Fishman's stock scam or review affidavits submitted in the criminal case because of "'a deliberate decision not to acquire knowledge of facts that might confirm the probable falsity of [his] charges.'" (Pet. 24) The question was whether Scientology had given orders to Fishman concerning a death threat against Dr. Geertz and suicide. The crucial people who knew the answer to that question were Fishman, Geertz and Scientology officials. Behar spoke to Fishman and Geertz; Scientology refused to talk to him.

[13] Although the Petition refers to the Noah Lottick statements as the second example of the "general charges" that the Article makes (Pet. 5), it does not discuss the evidence considered by the Court of Appeals in affirming the district court's judgment as to the lack of actual malice. The report of Noah Lottick's suicide was based on Behar's extensive interviews of Noah's parents and friends. The Scientology official Behar sought to interview would not speak with him. *See* App. A 12a-13a.

Second Circuit itself, in this and an earlier decision, made plain that the subsidiary meaning doctrine, rooted in the actual malice standard, differs in a fundamental way from the reputation-focused incremental harm doctrine. (App. A 13a-14a) And Judge Kozinski, whose dissent in the Ninth Circuit's *Masson* decision foreshadowed this Court's ultimate rejection of incremental harm as a constitutional requirement, considered the subsidiary meaning doctrine, compared it to incremental harm and found the former to be "very different, and quite unexceptional . . . ." 895 F.2d at 1565.

In this case, the Court of Appeals, having considered the overwhelming evidence that Behar lacked actual malice with respect to the "larger thrust" of the Article, *i.e.*, that "'Scientology, rather than being a bona fide religion, is in fact organized for the purpose of making money by means legitimate and illegitimate'" (App. A 15a, quoting App. D 65a), declined to permit the suit to continue with respect to a statement that was "subsidiary in meaning," *i.e.*, that "[o]ne source of funds for the Los Angeles-based church is the notorious, self-regulated stock exchange in Vancouver, British Columbia, often called the scam capital of the world." (App. A 3a, 13a-16a)

The Court of Appeals did not reach either ground, but might well have dismissed this claim on the grounds that the statement was neither defamatory of CSI[14] nor published

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[14] The "one source of funds" statement, which appears in a sidebar accompanying the Article, states that the Vancouver Stock Exchange ("VSE"), *not* CSI, is "notorious" and "often called the scam capital of the world." (Article 54) Other statements in the sidebar charge that individual Scientologists (not CSI) "take over companies, hype the stock [and] sell their shares." (*Id.*) The sidebar levels charges at individual Scientologists, who were free to bring their own legal claims (and one did). It did not defame CSI.

with actual malice.[15] Both arguments were presented to the Court of Appeals and would provide independent bases for dismissal.

In affirming the dismissal of the Vancouver Stock Exchange claim, the Court of Appeals applied its own prior decision in *Herbert* v. *Lando*, 781 F.2d 298 (2d Cir.), *cert. denied*, 476 U.S. 1182 (1986), which held that

> "when a 'published view' of a plaintiff is not actionable as libel, other statements made in the same publication are not 'actionable if they merely imply the same view, and are simply an outgrowth of and subsidiary to those claims upon which it has been held there can be no recovery.'" (App. A 13a, quoting, in part, 781 F.2d at 312).

The Second Circuit explicitly recognized that in *Masson* this Court rejected the idea that the incremental harm doctrine was constitutionally compelled.[16] (App. A 13a) The

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[15] It is undisputed that Michael Baybak and Kenneth Gerbino, the focus of the discussion in the sidebar, made money on the VSE and that they made substantial contributions to Scientology. Behar knew that Baybak and Gerbino, both prominent Scientologists, were each included in a list of "Patrons" who had contributed $40,000 or more to the International Association of Scientologists which Behar had reviewed prior to publication of the Article (A329-30; A1289). Behar had considerable evidence, as well, that Baybak and Gerbino were investing in and serving as officers and/or directors of companies listed on the VSE. Behar had ample reason for his belief that Baybak's and Gerbino's dubious activities on the VSE helped fund the substantial contributions they made to Scientology, and the statements made in the sidebar were made without actual malice.

[16] The states of course remain free under *Masson*, *supra*, 501 U.S. at 523, to adopt the incremental harm doctrine, and the doctrine has been recognized under New York law. *Jewell* v. *NYP Holdings, Inc.*, 23 F. Supp.2d 348 (S.D.N.Y. 1998); *Fulani* v. *New York Times Co.*, 260 A.D.2d 215, 686 N.Y.S.2d 703 (N.Y. App. Div. 1999). This ground, also urged on the Second Circuit here, would provide a separate state-law basis for decision.

incremental harm doctrine was described by this Court as turning on whether certain reputation-damaging statements were nonactionable and "then undertak[ing] a factual inquiry into the reputational damage caused by the remainder of the publication." *Masson*, 501 U.S. at 523. As the Second Circuit recognized, this Court's rejection was premised on the fact that "[t]he question of incremental harm does not bear upon whether a defendant has published a statement with knowledge of falsity or reckless disregard of whether it was false or not." (App. A 14a, quoting *Masson*, 501 U.S. at 523)

The subsidiary meaning doctrine, by contrast, is expressly intended as a "gloss on constitutional actual malice." (App. A 13a) If a defendant lacks actual malice as to a central meaning, it also lacks actual malice in publishing statements implying the same or subsidiary meanings.

This was precisely the view of Circuit Judge Kozinski in his dissent in *Masson*, 895 F.2d at 1565-66, cited approvingly by this Court. Judge Kozinski recognized that in *Herbert*, 781 F. 2d at 311, the Second Circuit explicitly distinguished the incremental harm doctrine from subsidiary meaning, referring to the latter as "a reasoned and different ground . . . ."[17] Judge Kozinski recognized that *Herbert* had applied an approach different from the incremental harm doctrine that he (and subsequently this Court) rejected:

> "The holding of *Herbert* is in fact very different, and quite unexceptional: The court concludes that if the defendants' published view that Herbert lied about re-

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[17] At several points in the Petition an effort is made to blur this distinction, recognized by judges in both the Second and Ninth Circuits. The Petition suggests that the subsidiary meaning, incremental harm, substantial truth and libel-proof doctrines are all identical and indistinguishable. (Pet. at 10-11 and nn. 4-6) Subsidiary meaning is not identical to these other doctrines, as even a close reading of the cited portions of the Petition reflects.

> porting war crimes is not actionable, then other statements merely implying the identical view are not actionable either. *Id.* at 312. This is a far cry from saying, as does the majority, that *any* statement in a publication cannot be defamatory if the publication already contains a statement that is equally defamatory but unactionable, even if on an entirely different subject." *Masson,* 895 F.2d at 1565-66 (emphasis in original).

The Petition cites no cases rejecting this analysis or the subsidiary meaning doctrine, or suggesting that any conflict exists among the Circuits or with decisions of this Court.

And though the Petition now takes issue with whether the statement relating to the Vancouver Stock Exchange was in fact subsidiary in meaning to the "general charges" (Pet. 5-6) held to have been published without actual malice, going so far as to call the statements "unique" (Pet. 17), the fact is that in the courts below Petitioner conceded just the opposite, identifying the allegedly defamatory Vancouver Stock Exchange statement as one of three "specific instances" of a broader claim of unlawful activity by church leaders. Petitioner stated below:

> "Defendants analogized the Church to a criminal conspiracy, explicitly characterizing it as 'mafia-like,' 'classically terroristic,' and prone to systematic acts of violence, blackmail, and extortion. Defendants then purported to provide specific instances of unlawful activity by church leaders, including: *(1) false allegations of improper securities trading on the Vancouver Stock Exchange*; . . . ." Plaintiff's Memorandum of Law in Support of Motion to Modify Order Dismissing Plaintiff's Claims in Their Entirety, at 4 (Nov. 26, 1996). (emphasis added)

Here, as in *Herbert*, the statements "are simply an outgrowth of and subsidiary to those claims upon which it has been held

there can be no recovery." *Herbert,* 781 F.2d at 312. The subsidiary meaning approach applied below does not "expand First Amendment protection beyond the contours defined in *Sullivan.*" (Pet. 14) As the Court of Appeals recognized, it "is merely a gloss on constitutional malice . . . ." (App. A 13a) This application of the actual malice requirement provides no question worthy of this Court's review.

III.

This Court Should Not Entertain the Contention That a Public Figure Libel Plaintiff May Avoid the Actual Malice Requirement by Claiming Only Nominal Damages

Petitioner asserts that this Court should adopt a rule permitting a public figure libel plaintiff to avoid the actual malice requirement this Court has applied since *Sullivan* by limiting its claim to nominal damages. This question is not properly presented by this case. And, even if it were not procedurally inappropriate, the Petitioner's approach, one flatly inconsistent with this Court's prior decisions and not endorsed by any lower court, does not warrant this Court's review.

Even if there were reason to consider whether to permit a public figure libel plaintiff to avoid the rigors of actual malice by pleading a claim strictly limited to nominal damages, this Petition does not present such a case. CSI's complaint alleges a single claim for relief, states that "this is an action for damages" and seeks both compensatory damages to be determined at trial and punitive damages of "no less than $416,000,000." Only after years of discovery on actual malice and after summary judgment had been granted dismissing the complaint in its entirety did CSI decide that it really sought only nominal damages after all. Recognizing the need for judicial intervention to permit such a claim to proceed, CSI first brought a motion under Rule 54(b) to modify

the Court's dismissal and then a motion under Rule 15(a) to amend its complaint. Both motions were denied. These discretionary denials by the district court provide a sufficient basis to deny the Petition.

A district court's refusal to modify an interlocutory order under Rule 54(b) is reviewed only for abuse of discretion. *Acha* v. *Beame*, 570 F.2d 57, 63 (2d Cir. 1978); *cf. Curtiss-Wright Corp.* v. *General Electric Co.*, 446 U.S. 1 (1980) (decision to certify under Rule 54(b) left to the discretion of the district court).

The district court properly analyzed CSI's November 1996 Rule 54(b) motion for what it was—a procedurally defective motion for reargument made months after the court's initial summary judgment decision. (App. E 71a) CSI's attempt to reargue was denied for two reasons: First, CSI improperly sought reconsideration of the summary judgment order in light of a new theory not previously argued. *St. Paul Fire and Marine Insurance Co.* v. *Heath Fielding Insurance Broking Ltd.*, 976 F. Supp. 198, 202 (S.D.N.Y. 1996) (internal quotations omitted) ("reargument is not a forum for new theories or for plugging the gaps of a lost motion with additional matters"). (App. E 72a-73a) Second, the motion was untimely under the district court's Local Civil Rule 3(j) (now Rule 6.3), which required that such a motion "be served within ten (10) days after the docketing of the court's determination of the original motion . . . ." (App. E 73a)

The district court was also well within its discretion in rejecting CSI's 1997 attempt to amend its 1992 complaint to assert a new claim that was based entirely on the same facts that CSI asserted when it commenced this suit. "It is settled that the grant of leave to amend the pleadings pursuant to Rule 15(a) is within the discretion of the trial court." *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 401 U.S. 321, 330 (1971). As justification for its nearly five-year delay, CSI offered only that its "understanding of its legal position"

changed "dramatically" when the court dismissed its libel claim entirely and that the idea of proposing a claim for nominal damages that would not require proof of actual malice was developed only after CSI had engaged new counsel following that dismissal. (A2843)[18] The district court, noting "the weight of authority," properly concluded that this was not sufficient justification. (App. F 83a-84a) *See Zenith*, 401 U.S. at 332-33 (recognizing relevance of delay in seeking amendment as a basis for denial of leave).

The district court, in any event, properly concluded that allowing CSI's proposed amendment would be "highly prejudicial to defendants." (App. F 84a) *See Zenith*, 401 U.S. at 330-31; *Barrows* v. *Forest Laboratories, Inc.*, 742 F.2d 54, 58-59 (2d Cir. 1984). As the district court knew, two-and-a-half years of discovery had focused on actual malice. That Time's summary judgment motion could be case-dispositive had obviously been a shared belief: the parties had expressly agreed that discovery on truth and falsity would occur only "[i]f the summary judgment motion is not granted . . . ." (A136)

The district court did not abuse its discretion in denying CSI's motions as untimely and unjustified, and the Petition should be denied for this reason.[19]

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[18] CSI had previously acknowledged the applicability of the actual malice requirement. *See, e.g.*, Plaintiff's Memorandum of Law in Opposition to Defendants' Motion for Summary Judgment, Jan. 16, 1995: "[A]t trial plaintiff will have to prove by clear and convincing evidence that defendants published the statements at issue with actual malice. . . ." (p. 8).

[19] While Petitioner states that the "court of appeals rejected CSI's argument on this point *on the merits*" (Pet. 25 n.22, emphasis in original), it does not follow that the Court of Appeals' single footnote reference to the issue (App. A 16a n.3) reflected a rejection of the procedural grounds relied upon by the district court and presented to the Second Circuit. It certainly provides no basis to ignore those glaring procedural deficiencies in considering the appropriateness of review by this Court. The Court of

Footnote continued on next page.

There is, in any event, no basis for a "nominal damages" exception to the rule requiring proof of actual malice in a public figure libel action. CSI has admitted that it is a public figure. Thus, as a matter of federal constitutional law, CSI may not recover for injury to its reputation without presenting clear and convincing proof that Time's allegedly defamatory statements were published either with knowledge of falsity or with reckless disregard for the truth. *Sullivan*, 376 U.S. at 279-80; *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 342 (1974).

In *Sullivan* and its progeny this Court articulated a constitutional privilege, grounded in the First Amendment, which limits the states' application of their libel laws to guard against the chill of self-censorship. CSI asks this Court to carve out a sweeping exception to the constitutional privilege—an exception that would allow a public figure plaintiff who seeks only nominal damages to recover without proving actual malice. The Second Circuit rejected CSI's proposed exception, there is no conflict in the lower courts on this issue, and no court has ever adopted the "interpretation" of *Sullivan* proposed by the Petition.

The fundamental premise of CSI's argument is that when this Court announced the constitutional privilege in *Sullivan* and defined its boundaries in subsequent cases, it was attempting only to avoid a chilling effect caused by "ruinous damage liability" or "substantial damage awards." (Pet. 27, 28) CSI reads *Sullivan* far too narrowly. Without the protection of the constitutional privilege, the burden and expense of defending a libel claim would create a powerful in-

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Footnote continued from previous page.

Appeals' minimal discussion of the issue, particularly in the absence of discussion by any other circuit court, also suggests that the matter is "not . . . sufficiently developed below" for this Court to review. *Roberts* v. *Galen of Virginia, Inc.*, 525 U.S. 249, 253 (1999).

centive for the press to engage in self-censorship, particularly when the claim is asserted by a litigant eager to harass a media defendant into self-censorship. As this Court has said:

> "Fear of large verdicts in damage suits for innocent or merely negligent misstatement, *even fear of expense involved in their defense*, must inevitably cause publishers to 'steer . . . wider of the unlawful zone.'" *Time Inc.* v. *Hill*, 385 U.S. 374, 389 (1967) (emphasis added) (quoting *Sullivan*, 376 U.S. at 279).[20]

Even in a case—notably unlike this one—where the plaintiff elected at the start of litigation to seek only nominal damages, the risk of self-censorship would be unacceptable.[21]

None of CSI's cases supports the claim that a public figure may prevail in a libel case absent proof of actual malice, and there is no occasion for this Court to embark on a journey the lower courts have yet to even consider.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

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[20] The Petition contends that this Court limited the rationale for *Sullivan*'s actual malice rule to protection against "ruinous damages" in *Herbert* v. *Lando*, 441 U.S. 153, 175-77 (1979) and rejected any concern about the cost of libel litigation. (Pet. 27 n.26) But the *Lando* discussion goes no further than to illustrate the point that the burdens inherent in the actual malice rule are a necessary concomitant of the protections it affords.

[21] As Judge Leisure pointed out, a federal court would, in any event, have no independent jurisdictional basis to hear the nominal damages claim CSI proposed to add, and the exercise of supplemental jurisdiction over a novel claim would be inappropriate. App. F 85a-86a.

Dated: New York, New York
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Supreme Court, U.S.
FILED
JUN 24 2001
OFFICE OF THE CLERK

No. 00-1683

IN THE

Supreme Court of the United States

CHURCH OF SCIENTOLOGY INTERNATIONAL,
Petitioner,

—v.—

TIME WARNER, INC., TIME INC. MAGAZINE COMPANY, and RICHARD BEHAR,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

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1. Respondents Attempt to Obscure the Court of Appeals' Refusal to Follow *Masson*

In a cluster of questionable rulings, the court of appeals' refusal to abide by the clear import of *Masson* v. *New Yorker Magazine*, 501 U.S. 496, 523 (1991), stands out as particularly egregious. *Masson* holds that it is up to the states to decide whether to enunciate defamation norms that are more protective than the actual malice rule of *New York Times* v. *Sullivan*, 376 U.S. 254 (1964). *Masson* refused to create a federal common law of libel in the guise of a gloss upon the First Amendment. The court of appeals' decision, however, attempts to eviscerate *Masson* by creating a new, constitutionally grounded, "subsidiary meaning doctrine" which, as applied here, amounts to little more than the rejected "incremental harm" doctrine.

Respondents try to deflect the Court's attention from the court of appeals' improper departure from the Court's jurisprudence, by relegating the issue to secondary status and surrounding it with an attack on petitioner. Respondents then claim that what the court called its "grounds for decision" in *Herbert* v. *Lando*, 781 F.2d 298, 312 (2d Cir. 1986) (*Lando II*), and Judge Kozinski's remark that those grounds for decision were "quite unexceptional," *Masson* v. *New Yorker Magazine*, 895 F.2d 1535, 1565-66 (9th Cir. 1989) (Kozinski, J., dissenting), provide support for respondents' argument that the subsidiary meaning "doctrine" differs in a fundamental manner from the libel-proof and incremental harm doctrines. But neither *Lando II* nor Judge Kozinski in *Masson* made the slightest suggestion that they were creating or envisaging a new legal "doctrine." *Lando II* was a narrow *holding* based on a

discrete and unique set of facts: the statements at issue provided *evidentiary support* for a number of specific, closely related factual allegations made in a set of nonactionable statements. As Judge Kozinski observed, because those statements "merely impl[ied] the *identical* view" as the nonactionable statements, the holding was indeed "quite unexceptional." *Id.*

In this case, in contrast, the Vancouver statements were not mere evidentiary support for other specific non-actionable statements; rather, they were intentionally printed in a *separate sidebar* and different from the non-actionable allegations of the article in general, in that they were the only allegations to suggest that the Church defrauded the *general public*.

Precisely because the Vancouver sidebar was distinct, separate and *additional* to the allegations made in the rest of the article,[1/] the newly conceived "subsidiary meaning doctrine" and its application to this case *cannot* be distinguished from the incremental harm doctrine. Indeed, the courts below did exactly what *Lando II* and Judge Kozinski were careful not to do. As

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1/ Respondents attempt to soften the sting of the Vancouver and Fishman statements by emphasizing that "the district court held that ... references in two of those four passages [i.e., the Vancouver and Fishman passages] to the activities of individual Scientologists failed to satisfy the 'of and concerning' requirement." (Br. in Opposition at 2.) The court of appeals, however, assumed that the entirety of the statements alleged in the complaint met the "of and concerning" requirement, *see* App. A, 8a, and the Court should proceed in accordance with that assumption.

Judge Kozinski put it, the holding in *Lando II* was "a far cry from saying ... that *any* statement in a publication cannot be defamatory if the publication already contains a statement that is equally defamatory but unactionable...." *Masson*, 895 F.2d at 1565-66.

Respondents further attempt to avoid certiorari by speculating that the district court, upon remand, would dismiss the Vancouver claim in any event under the incremental harm doctrine by applying New York law (Br. in Opp. at 23, n. 16). This is incorrect. First, while the courts below did not reach the issue, California, not New York, law applies in this case, and California does not recognize the incremental harm doctrine.[2/] Second, New York has not recognized the doctrine.[3/] Third, even

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2/ New York, the forum state, applies a complex multi-factor choice of law test, the most important factor being the place where the plaintiff suffered the most substantial injury. *See Davis* v. *Costa-Gavras*, 580 F. Supp. 1082, 1091 (S.D.N.Y. 1984). In this case, the balance of interests tips decidedly in favor of California law. The Ninth Circuit, per Judge Kozinski, has held that California has not and would not recognize the incremental harm doctrine because it is a "bad idea." *Masson* v. *New Yorker Magazine*, 960 F.2d 896, 898 (9th Cir. 1992) (quoting *Liberty Lobby Inc.* v. *Anderson*, 746 F.2d 1563, 1569 (D.C. Cir. 1984) (Scalia, J.)).

3/ Respondents mis-cite two cases in support of the proposition. *Jewell* v. *NYP Holdings, Inc.*, 23 F. Supp.2d 348 (S.D.N.Y. 1998), merely reaches the (disputable) conclusion that New York courts *would* recognize the doctrine. *Fulani* v. *New York Times Co.*, 260 A.D.2d 215, 686 N.Y.S.2d 703 (N.Y. App. Div. 1999), does not recognize or even mention the incremental harm doctrine, but rather addresses the *substantial truth* doctrine. For a discussion of the differences between these doctrines, see, *e.g.*, J. H. King, Jr., *The*

if it did recognize the doctrine in some form, there is no basis to speculate that it would apply it to the Vancouver sidebar under the circumstances of this case.

2. The Court of Appeals' Decision Invites Trial Courts to Consider Bias as Strong Evidence of a Lack of Actual Malice, Contrary to *Harte-Hanks* and *Liberty Lobby* and to Every Other Circuit

A journalist's animus or bias, whether based on pure prejudice or upon knowledge of actual or alleged past misconduct, certainly can cause the journalist to approach his subject in a predetermined manner, and can lead him to willfully ignore or suppress favorable evidence to his subject.

In this case, as set forth in the Petition, there was more than substantial evidence that Behar was highly inflamed against CSI, and that his bias, whatever its origin, led him to engage in a one-sided, result-oriented investigation and report, particularly with respect to the Fishman and Vancouver statements. For example, Behar failed to interview the FBI agents who investigated Fishman and determined he had lied with respect to both death threat allegations; failed to obtain or read the entire transcript of Fishman's sentencing; ignored or failed to obtain the report of the prison psychiatrist who determined that Fishman "manipulated everything about him his entire life" and "will manipulate all his life until he dies"; and refused to credit or even report the views of the prosecuting attorney, who thoroughly

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Misbegotten Libel-Proof Plaintiff Doctrine and the "Gordian-Knot" Syndrome, 29 Hof. L. Rev. 343, 374-76 (2000).

investigated Fishman and determined that he lied about everything he told government officials. Behar purported to rely principally on the account of Fishman's hypnotist-therapist Geertz, who had accepted as true proven lies of Fishman and whose defense of Fishman was rejected by the prosecutor, the probation officer, and the federal sentencing judge. Worse, Behar failed even to mention in his article that Fishman had been convicted for trying to frame CSI for the very crimes Behar reported.

Respondents' argument – that Behar was justified in his actions and did engage in an adequate investigation despite his bias – should have been made to a jury; it is not sufficient to compel summary judgment as a matter of law. *Anderson* v. *Liberty Lobby*, 477 U.S. 242, 255 (1986)("The drawing of legitimate inferences from the facts are jury functions, not those of a judge"); *Harte-Hanks Communications, Inc.* v. *Connaughton*, 491 U.S. 657, 667-68 (1989). The court of appeals' approval of the district court's grant of summary judgment on the ground that Behar's bias proves his belief in his false statements and thus his lack of actual malice is contrary to those decisions and to a host of circuit court decisions holding that a writer's bias is evidence of actual malice.[4/]

4/ See Pet., nn. 18, 19 (contrasting abundant decisions of state supreme courts and federal circuits holding that ill will is relevant to show actual malice, with rare decisions holding that ill will is not relevant to such determination). No court has suggested what the courts below did: that ill will or bias should be considered as strong evidence of an *absence* of actual malice, justifying summary

Contrary to respondents' assertion, the court of appeals did *not* merely approve the district court's statement that the "speaker's belief in his statements, even his exaggerations, enhances, rather than diminishes, the likelihood that that they are protected." Rather, the court carefully made this statement in the context of a neatly argued paragraph which also stated that the district court "properly applied the actual malice standard" when it found: (1) that "bias" would support a finding of actual malice only "if it were coupled with evidence of an *extreme departure* from standard investigative techniques" and (2) that petitioner failed "to make its evidence of bias probative of actual malice, *rather than probative of lack thereof.*" (App. A 10a) (emphasis added). Read as a whole, the passage clearly suggests that, because "belief" and "exaggerations" must be regarded as *enhancing* the likelihood that statements are made without actual malice, the district court properly weighed the existence of "bias" as proving an absence of malice as long as there is no "extreme departure." The court of appeals' conclusion thus does violate the Court's holding, in *Harte-Hanks*, that the question of which way an author's bias cuts ordinarily is a jury question. *Id.*, 491 U.S. at 667-68, 692.[5/]

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judgment on behalf of a defendant unless a plaintiff can demonstrate an "*extreme* departure from standard investigative techniques" (Pet., App. A, 10a) (emphasis added).

5/ Respondents' assertion that Professor Neuborne conceded Behar's good faith at oral argument below (Br. in Opposition at 4, 12), is frivolous on its face.

3. Respondents' Attempt to Create a New Variant of the Libel-Proof Plaintiff Doctrine – the Actual-Malice-Proof Reporter – is Not a Proper Basis to Deny Certiorari

In the wake of the Court's explicit rejection of the incremental harm doctrine and implicit rejection of the libel-proof plaintiff doctrine in *Masson*, respondents attempt to achieve the same result by positing what in effect is an "Actual-Malice-Proof Reporter" doctrine. Rather than directly argue that a plaintiff may have no redeemable reputation, respondents claim that a reporter, informed of prior accounts of alleged misdeeds of his subject, in effect can never be found to have acted with actual malice in making new allegations of comparable misdeeds against that subject. The effect, of course, is the same – the subject is rendered fair game to any and all false and defamatory statements, not only for alleged acts widely reported in the past but, apparently, for any new or future alleged acts.

Thus, in pointing to allegations of earlier wrongs allegedly committed by Church officials, respondents conceal and elide the crucial chronological distinction between those earlier allegations and the defamatory allegations at issue in this case. The article appeared in 1991. Nearly all the allegations of misconduct upon which respondents now rely in arguing that they had a good faith belief in the claims set forth in the article (Br. in Opp. at 6-7, 14-16) purportedly took place years earlier. Indeed, while in the past certain church officials concededly committed improper acts, CSI submits that most of the allegations of past misconduct were false

and distorted, the result of the misunderstanding, suspicion and prejudice that typically greet a new religion. Moreover, as respondents were fully aware, Scientology religious leaders removed those officials implicated in acknowledged past misdeeds, and reorganized church structure, at which time CSI was created. The manifest aim of Behar's article was to convince the public that these efforts were a *sham*, that improper and criminal activities were ongoing under CSI's new leadership. In furthering that aim, respondents cannot hide behind their knowledge of the allegations of past misconduct to shield knowing or reckless false statements about more recent events. *See Harte-Hanks Communications*, 491 U.S. at 682.

Respondents' argument again illustrates the improper assumption of monolithic reputation. It is not true that *moral* identity coincides with identity of name or body, that an individual is properly deemed "guilty" of one act because he is alleged to have committed other, previous wrongful acts. See *Liberty Lobby*, 746 F.2d at 1568 (Scalia, J.). Thus, journalists should not be excused, on summary judgment, for making defamatory statements regarding one act whenever they have knowledge of allegations concerning other, previous acts. Such a principle would merely create "actual-malice-proof" journalists and thereby, indirectly, perpetuate the justly criticized libel-proof plaintiff doctrine.[5/] The proper inquiry is whether a *specific*

5/ In addition to Justice Scalia's criticism in *Liberty Lobby*, see, *e.g.*, J. H. King, Jr., *The Misbegotten Libel-Proof Plaintiff Doctrine and*

statement was made with actual malice. *Masson*, 501 U.S. at 523 ("[t]he question of incremental harm does not bear upon whether a defendant has published *a statement* with [actual malice]") (emphasis added). Precisely the *specificity* of the inquiry forbids a court from imposing a pessimistic rule of law that contradicts the very principle of ordered liberty that forms the basis of the Court's free speech jurisprudence.

4. Respondents' Opposition Highlights the Need for the Court to Clarify that *Sullivan* Does Not Mandate Application of the Actual Malice Rule to Nominal Damages Claims Designed to Redeem Reputation

Respondents argue that the costs of litigation in defending claims for nominal damages are such that actual malice protection is, and must be, extended to the media even in such cases. But the Court has never held that the First Amendment protects large, multinational media organizations from the processes of litigation to which everyone else in America is subjected. Indeed, this argument was rejected in *Herbert* v. *Lando*, 441 U.S. 153, 176 (1979) (*Lando I*):

> It is suggested that the press needs constitutional protection from these burdens [of discovery] if it is to perform its task ... Only complete immunity from liability for defamation

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the "Gordian-Knot" Syndrome, 29 Hof. L. Rev. 343, 345-46 (2000) (stating that the libel-proof, incremental harm and related doctrines create "defamation Untermenschen").

> would effect this result, and the Court has regularly found this to be an untenable construction of the First Amendment.

Id. Respondents point out that in *Lando I* the actual malice rule was applicable because substantial rather than nominal damages were sought, and emphasizes that the Court has not yet specifically held that libel plaintiffs can seek nominal damages without undergoing the burdens imposed by that rule. That, of course, is precisely why petitioner has asked the Court to clarify this important question of law.[7/]

CONCLUSION

The petition should be granted.

Dated: July 24, 2001

Respectfully submitted,

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7/ Respondents also argue that the district court rejected petitioner's claim for nominal damages as "untimely." The court of appeals, however, rejected CSI's argument on this point *on the merits*, holding that a public figure plaintiff must prove actual malice even to recover nominal damages (Pet., App. A, 16a, n. 3). The court of appeals understood that the claim was inherent in CSI's original complaint, and that the district court, at the least, had supplementary jurisdiction over it.